No. 79-1423

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
APPELLANT,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
APPELLEE.

Appeal From The Court Of Appeal,
Second Appellate District,
State of California

JOINT APPENDIX

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Appeal Docketed March 13, 1980
Probable Jurisdiction Noted October 6, 1980.

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Stipulation of Facts	3
Certificate of Authority from State of California, Department of Insurance to the Western and Southern Life Insurance Company (Exhibit A to the Stipulation of Facts)	43
Amended Complaint for Recovery of Taxes Paid Under Protest	44
Stipulation Re: Filing of Amended Complaint and Answer Thereto	46
Supplemental Stipulation	47
Minute Order of Intended Decision	55
Memorandum of Intended Decision	57
Conclusions of Law	73
Judgment	78
Opinion of the Court of Appeal, Second Appellate District, State of California	80
Order Modifying Opinion and Denying Rehearing, Court of Appeal, Second Appellate District, State of California	88
Order of the Supreme Court of California	89

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 17, 1971 — Plaintiff's Complaint for Recovery of Taxes Paid Under Protest filed in Superior Court of the State of California for the County of Los Angeles.

June 4, 1971 — Defendant's Answer filed.

Dec. 31, 1976 — Stipulation of Facts filed.

Dec. 31, 1976 — Plaintiff's Amended Complaint for Recovery of Taxes Paid Under Protest filed.

Dec. 31, 1976 — Stipulation Re: Filing of Amended Complaint and Answer Thereto filed.

Dec. 31, 1976 — Notice of Motion and Motion to Specially Set Case for Trial and for Assignment of Case to Trial Judge for All Purposes; Declaration of Ronald M. Oster and Memorandum of Points and Authorities in Support Thereof.

Jan. 13, 1977 — Order entered assigning action to Judge Early.

Jan. 13, 1977 — Minute Order of Jan. 13, 1977, Setting Briefing Schedule and Trial Date entered.

Feb. 28, 1977 — Plaintiff's Opening Brief filed.

May 4, 1977 — Defendant's Trial Brief filed.

May 24, 1977 — Plaintiff's Reply Brief filed.

May 24, 1977 — Supplemental Stipulation filed.

June 10, 1977 — Defendant's Supplemental Trial Memorandum filed.

June 10, 1977 — Trial and Oral Argument.

June 10, 1977 — Minute Order of June 10, 1977 entered.

July 6, 1977 – Plaintiff's Reply Brief to Defendant's Supplemental Trial Memorandum filed.

August 4, 1977 – Minute Order of August 4, 1977 entered.

August 4, 1977 – Memorandum of Intended Decision filed.

Oct. 27, 1977 – Conclusions of Law filed.

Oct. 27, 1977 – Judgment entered in favor of Plaintiff.

Nov. 1, 1977 – Notice of Entry of Judgment.

Dec. 21, 1977 – Defendant's Notice of Appeal filed; Notice to Clerk of Superior Court to Prepare Reporter's Transcript on Appeal.

Nov. 2, 1979 – Opinion and Judgment of the Court of Appeal, Second Appellate District, State of California, reversing the decision of the lower court, entered.

Nov. 19, 1979 – Petition for Rehearing filed.

Nov. 28, 1979 – Order of the Court of Appeal, Second Appellate District, State of California, modifying its opinion of Nov. 2, 1979 and Denying Rehearing entered.

Dec. 11, 1979 – Petition for Hearing by the Supreme Court of California filed.

Dec. 27, 1979 – Order of the Supreme Court of California Denying the Petition for Hearing entered.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

NO. C 3189

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Defendant.

STIPULATION OF FACTS

(Filed December 31, 1976)

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys of record, for purposes of this case only, that the following facts shall be taken as true and shall be adopted as part of the Court's findings of fact. This stipulation shall not be construed as a concession by either party of the relevancy or materiality of any of the facts stipulated herein; and the parties hereto expressly reserve the right to argue the relevancy or materiality of any of the facts herein stipulated to be true.

Except as otherwise provided herein, all exhibits attached hereto, or otherwise incorporated herein by reference, are included for the limited purpose of showing the contents

thereof and not for the truth of the matters therein set forth; provided, however, that either party may offer any of such documents for additional purposes subject to objections as to competency, relevancy and materiality but not subject to the best evidence objection or any objection as to their genuineness or the due execution thereof.

Nothing herein contained shall be construed as a waiver by any of the parties hereto of their rights to review on appeal any question of law or of fact arising in this action in the same manner and to the same extent as if the facts herein set forth had been proven in open court.

Each party may introduce at the trial of this cause any other or further evidence which is not inconsistent with the facts stated herein. To the extent possible, notice of such intended introduction shall be given to the other party sufficiently in advance of trial to enable the other party to meet such evidence.

This stipulation shall be valid only in the above-entitled action.

1. Plaintiff is, and was continuously for more than eighteen (18) years last past and at all times herein referred to, a mutual life and disability insurer incorporated under the laws of, and having its principal place of business in, the State of Ohio and admitted and authorized to do and doing a life and disability insurance business and no other business in the State of California. Plaintiff did not at any time herein referred to, and does not now, have any surplus divided into shares, or any shares whatsoever. Plaintiff, effective July 1, 1956 and at all times thereafter, was, and now is, the holder of a Certificate of Authority for an indefinite term issued pursuant to the provisions of section 701 of the Insurance Code of the State of California. A copy of said Certificate of Authority

is attached hereto as Exhibit A and by reference is made a part hereof.

2. On December 4, 1962, in an action before the Superior Court of the State of California for the County of Los Angeles numbered 765737, in which action plaintiff herein was the plaintiff and the defendant herein and F. Britton McConnell, as Insurance Commissioner of the State of California, were the defendants, which action involved taxes for business done only in the year 1959, a judgment was duly entered against the defendants, and on said date, in an action before the Superior Court of the State of California for the County of Los Angeles numbered 785827, in which action plaintiff herein was the plaintiff and defendant herein was the defendant, which action involved taxes for business done only in the year 1960, a judgment was duly entered against the defendant. Each said judgment has become final. By each said judgment it was adjudicated, that by the laws of the State of Ohio, taxes, fines, penalties, licenses, fees, deposits of money or securities or other obligations or prohibitions imposed upon life insurers of California analogous to plaintiff doing business in Ohio, or upon their agents therein, were not in excess of those imposed by the State of Ohio upon such insurers of Ohio or upon their agents therein. Retaliatory taxes against plaintiff were not authorized under then existing California law and were not and could not be validly or legally assessed or collected as against plaintiff under then existing California law.

3. In the year 1965 and continuously thereafter, plaintiff's Principal Office in the State of California was, and now is, located at 2600 Wilshire Boulevard, Los Angeles, California, in real property then and now owned by plaintiff on which plaintiff had specially constructed a building for such purpose and on which it paid, before delinquency,

in the year 1965 and in all years thereafter, while its Principal Office was so located, the real estate taxes thereon duly assessed. Said real property at all times consisted only of one building in which such office was located, the land on which said building then stood and so much of the adjacent land as was then required for the convenient use and occupation thereof. Said real estate tax so paid for the years 1965 through 1971 was equal to the following sums:

1965 — $111,877.50
1966 — $115,644.37
1967 — $117,396.19
1968 — $124,069.03
1969 — $128,049.78
1970 — $121,173.59
1971 — $120,354.69

4. For each year, 1965, 1966, 1967, 1968, 1969, 1970 and 1971, and within the time provided by law, plaintiff filed with the Insurance Commissioner of the State of California, hereinafter referred to as "the Commissioner," in duplicate, its tax return (other than retaliatory) with respect to the business done by the plaintiff in California for the whole of each such calendar year, and as a part thereof, on a form supplied by the Department of Insurance, filed its Supplement to Annual Tax Return for each such year setting forth all information requested by the Department of Insurance relating to its Principal Office Tax Deduction. A copy of each said tax return, including the supplement, for each such year is attached hereto, marked "Exhibits B, C, D, E, F, G and H" respectively, and by reference said tax returns and supplements are made a part hereof.

5. (a) The California premiums tax return of plain-

tiff, including said supplement, for the year 1965 set forth that $133,595.10 was the gross premiums tax (exclusive of any retaliatory tax) payable by plaintiff on its business in California in the calendar year 1965; that the Principal Office Deduction allowable to plaintiff as a credit against the gross premiums tax for said year was $111,877.50, leaving a net premiums tax of $21,717.60 attributable to plaintiff's 1965 business in California, exclusive of any retaliatory tax; that plaintiff had, in conformity with the law, made prepayments on account of said tax in the aggregate sum of $12,000.00, leaving a balance of $9,717.60, which was duly and timely paid by plaintiff at the time it filed its said return. In addition plaintiff paid the Commissioner $35.00 as the fees claimed by the Commissioner for the filing of plaintiff's Annual Statement and on account of its Certificate of Authority.

(b) For purposes of this litigation the parties agree that the factual allegations, figures, and computations shown on plaintiff's 1965 premiums tax return and supplement thereto are accurate except that $5,893.94 of the deductions which were claimed by plaintiff on the return were later determined by defendant Board to be not properly deductible (see paragraph 5 (j) below).

(c) Plaintiff, after receiving written demand therefor from the Commissioner which threatened the imposition of mandatory penalties for any late filing thereof, filed, under protest, with the Commissioner, on or before September 1, 1966, a Retaliatory Tax Information Return with respect to the business done by plaintiff in California during the year 1965. A copy thereof is attached hereto as "Exhibit I" and by reference is made a part hereof.

(d) Defendant Board, on or about September 14, 1966, assessed and levied against plaintiff retaliatory tax in the

amount of $128,352.23, and on or about September 15, 1966, defendant gave written notice to plaintiff that, on the recommendation of the Commissioner, such assessment had been made as retaliatory tax pursuant to section 12284 of the Revenue and Taxation Code of California on plaintiff's business done in California in 1965, and that plaintiff would become subject to penalty in the event such additional tax was not paid by December 1, 1966. The Commissioner and the defendant Board computed such assessment of retaliatory taxes by subtracting plaintiff's California premiums tax liability of $21,717.60 (as computed by plaintiff on its return for the year 1965) and the California fees of $35.00 set forth in paragraph 5 (a) above from $150,104.83, the sum of the Ohio premiums taxes and fees which would have been imposed on a similar California insurer transacting the same kind and amount of insurance business in the State of Ohio that plaintiff transacted in California. Such amount of Ohio premiums taxes and fees was computed by the Commissioner and defendant Board from the figures reported by plaintiff on page 2 of plaintiff's 1965 Retaliatory Tax Information Return ("Exhibit I", included herein by reference in paragraph 5 (c) above) and it does not include any real estate taxes which would have been payable to the State of Ohio or any subdivision of the State of Ohio. The parties agree that the figures reported on "Exhibit I" are factually accurate.

(e) On or about October 7, 1966, plaintiff duly filed with defendant plaintiff's written petition for the correction of said retaliatory tax assessment on 1965 business, seeking the correction thereof to zero and the cancellation thereof. On October 13, 1966, an executed duplicate copy of said petition was filed with the Commissioner.

(f) The defendant Board denied plaintiff's petition and so notified plaintiff on November 23, 1966.

(g) On or about November 25, 1966, in response to the demand of the defendant therefor and under the threat of penalty for nonpayment thereof, plaintiff paid to the State Controller the full amount of said additional assessment with respect to 1965 business, $128,352.23, under written protest set forth in plaintiff's letter of transmittal of payment.

(h) On or about January 24, 1967, plaintiff duly filed with the defendant a duly executed Claim for Credit and Refund of Tax with respect to business done in 1965, demanding reimbursement of the amount of the additional tax payment made pursuant to demand of the defendant, $128,352.23, together with interest thereon. On or about said date, an executed duplicate copy of said claim was filed with the Commissioner. A copy of such claim is attached hereto, marked "Exhibit J" and incorporated herein by this reference as if fully rewritten herein.

(i) On or about February 18, 1971, said Claim for Credit and Refund was denied in its entirety by defendant Board, and written notice of defendant's denial of plaintiff's claim was mailed to plaintiff on or about February 22, 1971.

(j) Based on figures reported by plaintiff in 1970 in an amendment to its annual premiums tax return for year 1965, on or about June 12, 1970, defendant Board, acting pursuant to section 12424 of the Revenue and Taxation Code, assessed against plaintiff a premiums tax deficiency assessment of $137.33 plus interest; this assessment arose from the deduction on plaintiff's original return for 1965 of $5,893.94 later found to be not properly deductible. As a result of this assessment, the total 1965 premiums tax

liability for plaintiff as computed by defendant Board was increased to $21,854.93, and the total 1965 retaliatory tax liability for plaintiff as computed by defendant Board was reduced to $128,214.90. Plaintiff paid without protest the applicable interest of $4.12 and did not contest the addition of $137.33 to its 1965 premiums tax liability and the subtraction of the same amount from its 1965 retaliatory tax liability. This premiums tax assessment of $137.33 is not being challenged by plaintiff in this proceeding

(k) Of the $150,069.83 set forth above as taxes paid by plaintiff for the year 1965, defendant Board presently contends that $21,854.93 was due for 1965 premiums tax liability and $128,214.90 was due for 1965 retaliatory tax liability. Plaintiff agrees for purposes of this litigation that $21,854.93 was due from it as 1965 premiums tax liability, but contends that no retaliatory tax for 1965 was due.

6. (a) In its California premiums tax return and the supplement thereto for the year 1966 ("Exhibit C" included herein by reference in paragraph 4 above) plaintiff claimed that $146,765.33 was the gross premiums tax (exclusive of any retaliatory tax) payable by plaintiff due to its insurance business in California in the calendar year 1966. The amount of such tax was computed by plaintiff on the basis that the tax owed by plaintiff (an Ohio corporation) was the same tax as would be payable to California if plaintiff were an insurance company incorporated in California with otherwise identical attributes (which method of computation is hereinafter called the "California Company Basis"). The return and supplement thereto claimed that the Principal Office Deduction allowable to plaintiff for said year was $115,644.37, leaving a net premiums tax of $31,120.96 claimed by plaintiff

on the return as attributable to plaintiff's 1966 business in California, exclusive of any retaliatory tax. In addition to the calculation of the Principal Office Deduction on the "California Company Basis", plaintiff's return supplement also contained an alternative calculation of the Principal Office Deduction in which plaintiff attempted to calculate said deduction in the manner prescribed by Article XIII, Section 14 4/5,[1] subdivision (e) of the California Constitution as amended in 1966 and as applied to an Ohio corporation. By using such alternative calculation, the amount of the Principal Office Deduction was determined by plaintiff to be $37,538.56. Plaintiff, claiming that said 1966 amendment to the California Constitution was unconstittuional as applied to plaintiff, did not use the alternative calculation in arriving at the amount of premiums taxes it claimed on its return to be due for the year 1966. Plaintiff's return correctly recited that plaintiff had made prepayments on account of said tax in the aggregate sum of $21,000.00, leaving a balance due, as calculated by plaintiff, of $10,120.96, which amount was timely paid by plaintiff at the time it filed its said return. In addition plaintiff paid the Commissioner $35.00 as the fees claimed by the Commissioner for the year 1966 for the filing of plaintiff's annual statement and on account of its certificate of authority.

(b) For purposes of this litigation the parties agree that the factual allegations, figures, and computations shown on plaintiffs' 1966 premiums tax return and supplement thereto are true and accurate except for the following:

(i) $19,475.54 of the deductions which were claimed by plaintiff on the return were later deter-

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[1] In 1974 Section 14 4/5 was renumbered Section 28; the earlier number is used in this stipulation.

mined by defendant Board to be not properly deductible (see paragraph 6 (l) below);

(ii) Defendant Board contends that the plaintiff's alternative figures for the Principal Office Deduction should have been used to determine the proper amount of the Principal Office Deduction after being adjusted to reflect the allocation of the real estate taxes attributable to the parking areas involved (see paragraphs 6 (c) and 6 (m) below).

(c) On or before July 14, 1967, defendant Board, acting under sections 12412 and 12413 of the Revenue and Taxation Code, notified plaintiff that the premiums tax (exclusive of retaliatory tax) due from plaintiff for 1966 was $109,226.77, computed by subtracting from a gross tax of $146,765.33 a Principal Office Deduction of $37,538.56, which last-mentioned amount is the amount of the Principal Office Deduction resulting from the alternative calculation shown on plaintiff's 1966 premiums tax return supplement as described in paragraph 6 (a) above. The defendant thereupon notified plaintiff further that plaintiff was required to pay the additional amount of $78,105.81 as premiums tax, with interest at the rate of six percent (6%) per annum, to wit, $390.53, on or before July 15, 1967, or be subject to penalty thereon.

(d) On July 14, 1967, in response to defendant's demand and to avoid the penalties which the Commissioner threatened to impose against plaintiff for nonpayment of said additional assessment for the year 1966, plaintiff paid to the Commissioner, under written protest, said additional tax of $78,105.81 and $390.53 interest, a total of $78,496.34.

(e) Plaintiff, after receiving written demand therefor from the Commissioner which threatened the imposition of

mandatory penalties for any late filing thereof, filed, under protest, with the Commissioner, on or before August 1, 1967, a Retaliatory Tax Information Return with respect to the business done by plaintiff in California during the year 1966. This return was reported on the basis of a California Principal Office Deduction of $115,644.37. A copy thereof is attached hereto as "Exhibit K" and by reference is made a part hereof.

(f) Defendant Board, on or about August 10, 1967, assessed and levied against plaintiff retaliatory tax in the amount of $52,971.68, and on or about August 11, 1967, defendant gave written notice to plaintiff that, on the recommendation of the Commissioner, such assessment had been made as retaliatory tax pursuant to section 12284 of the Revenue and Taxation Code of California on plaintiff's business done in California in 1966, and that plaintiff would become subject to penalty in the event such additional tax was not paid by December 1, 1967. The Commissioner and the defendant Board computed such assessment of retaliatory taxes by subtracting plaintiff's California premiums tax liability of $109,226.77 (as computed by Commissioner and defendant in the assessment set forth in paragraph 6 (c) above) and the California fees of $35.00 set forth in paragraph 6 (a) above from $162,-233.45, the sum of the Ohio premiums taxes and fees which would have been imposed on a similar California insurer transacting the same kind and amount of insurance business in the State of Ohio that plaintiff transacted in California. Such amount of Ohio premiums taxes and fees was computed by the Commissioner and defendant Board from the figures reported by plaintiff on page 2 of plaintiff's 1966 Retaliatory Tax Information Return ("Exhibit K" included herein by reference in paragraph 6 (e) above) and does not include any real estate taxes which would

have been payable to the State of Ohio or any subdivision of the State of Ohio. The parties agree that the figures reported on pages 2 and 3 of "Exhibit K" are factually accurate.

(g) On or about September 21, 1967, plaintiff duly filed with defendant plaintiff's written petition for the correction of said retaliatory tax assessment on 1966 business, seeking the correction thereof to zero and the cancellation thereof. On September 21, 1967, an executed duplicate copy of said petition was filed with the Commissioner.

(h) The defendant Board denied plaintiff's petition on November 8, 1967, and so notified plaintiff on November 10, 1967.

(i) On or about November 24, 1967, in response to the demand of the defendant therefor and under the threat of penalty for nonpayment thereof, plaintiff paid to the State Controller the full amount of said additional assessment with respect to 1966 business, $52,971.68, under written protest set forth in plaintiff's letter of transmittal of payment.

(j) On or about December 14, 1967, plaintiff duly filed with the defendant two duly executed written Claims for Credit and Refund of tax with respect to business done in 1966. One of such claims was filed with respect to the portion of the tax paid for the year 1966 which resulted from the denial to plaintiff of part of the Principal Office Deduction it had claimed in its return on the "California Company Basis"; the other claim was filed with respect to the portion of such tax designated as retaliatory tax. Copies of said claims are attached hereto and marked "Exhibits L and M" respectively, and the same are incorporated herein by this reference as if fully rewritten herein.

(k) On or about February 18, 1971, each of said claims for Credit and Refund was denied in its entirety by defendant Board, and written notice of said denials was mailed to plaintiff on or about February 22, 1971.

(l) Based on figures reported by plaintiff in 1971 in an amendment to its annual premiums tax return for year 1966 (see last page of "Exhibit G" included herein by reference in paragraph 4 above) on or about June 8, 1971, defendant Board, acting pursuant to section 12424 of the Revenue and Taxation Code, assessed against plaintiff a premiums tax deficiency assessment of $453.77 plus interest; this assessment arose from the deduction on plaintiff's original return for 1966 of $19,475.54 later found to be not properly deductible. As a result of this assessment, the total 1966 premiums tax liability for plaintiff as computed by defendant Board was increased to $109,-680.54, and the total 1966 retaliatory tax liability for plaintiff as computed by defendant Board was reduced to $52,-517.91. Plaintiff paid without protest the applicable interest of $13.61 and did not contest the addition of $453.77 to its 1966 premiums tax liability and the subtraction of the same amount from its 1966 retaliatory tax liability. This premiums tax assessment of $453.77 is not being challenged by plaintiff in this proceeding.

(m) On or about February 3, 1972, defendant Board, acting pursuant to section 12424 of the Revenue and Taxation Code, assessed against plaintiff a premiums tax deficiency assessment for year 1966 of $2,792.05 plus interest. Such assessment was made because, in making the alternative calculation regarding the Principal Office Deduction in its 1966 premiums tax return supplement as described in paragraph 6 (a) above, plaintiff had not apportioned the real estate taxes paid for parking areas pertaining to its principal office building between the areas

used by plaintiff and the areas used by plaintiff's tenants. The amount of the additional assessment was determined solely through the use of figures provided by plaintiff in its 1966 premiums tax return and supplement. As a result of this assessment, the total 1966 premiums tax liability for plaintiff as computed by defendant Board was increased to $112,472.59, and the total 1966 retaliatory tax liability for plaintiff as computed by defendant Board was reduced to $49,725.86. On March 6, 1972, the State Controller received from plaintiff payment of the interest charged by defendant; plaintiff denied and continues to deny the validity of any allocation of real estate taxes paid by plaintiff on the parking lots pertaining to its office building housing its principal California office.

(n) Of the $162,198.45 set forth above as taxes paid by plaintiff for the year 1966, defendant Board presently contends that $112,472.59 was due for 1966 premiums tax liability and $49,725.86 was due for 1966 retaliatory tax liability. Plaintiff contends for purposes of this litigation that $31,574.73 was due from it as 1966 premiums tax liability, and that no retaliatory tax for 1966 was due. The $80,897.86 difference between the 1966 premiums tax liability as computed by the Board and as computed by plaintiff is attributable solely to the questions of whether the 1966 amendment to article XIII, section 14 4/5, subdivision (e) is constitutional and whether it can be constitutionally applied to plaintiff.

7. (a) In its California premiums tax return and the supplement thereto for the year 1967 ("Exhibit D" included herein by reference in paragraph 4 above) plaintiff claimed that $162,323.81 was the gross premiums tax (exclusive of any retaliatory tax) payable by plaintiff due to its insurance business in California in the calendar year 1967. The amount of such tax was computed by plain-

tiff on the "California Company Basis" (as if plaintiff were a California corporation). The return and supplement thereto claimed that the Principal Office Deduction allowable to plaintiff for said year was $117,396.19, leaving a net premiums tax of $44,927.62 claimed by plaintiff on the return as attributable to plaintiff's 1967 business in California, exclusive of any retaliatory tax. In addition to the calculation of the Principal Office Deduction on the "California Company Basis", plaintiff's return supplement also contained an alternative calculation of the Principal Office Deduction in which plaintiff attempted to calculate said deduction in the manner prescribed by Article XIII, section 14 4/5, subdivision (e) of the California Constitution as amended in 1966 and as applied to an Ohio corporation. By using such alternative calculation, the amount of the Principal Office Deduction was determined by plaintiff to be $41,423.43. Plaintiff claiming that said 1966 amendment to the California Constitution was unconstitutional as applied to plaintiff, did not use the alternative calculation in arriving at the amount of premiums taxes it claimed on its return to be due for the year 1967. Plaintiff's return correctly recited that plaintiff had made prepayments on account of said tax in the aggregate sum of $48,000.00. Thus, according to plaintiff's calculation, the prepayments for the calendar year 1967 exceeded the amount of the premiums tax due for said year by $3,072.38. In addition plaintiff paid the Commissioner $72.50 as the fees claimed by the Commissioner for the year 1967 for the filing of plaintiff's annual statement, for the filing of certain amendment forms, and on account of its certificate of authority.

(b) For purposes of this litigation the parties agree that the factual allegations, figures, and computations shown on plaintiff's 1967 premiums tax return and sup-

plement thereto are true and accurate except that defendant Board contends that plaintiff's alternative figures for the Principal Office Deduction should have been used to determine the proper amount of the Principal Office Deduction after being adjusted to reflect the allocation of the real estate taxes attributable to the parking areas involved (see paragraphs 7 (c) and 7 (i) below).

(c) On or about May 9, 1968, defendant Board, acting under sections 12412 and 12413 of the Revenue and Taxation Code, notified plaintiff that the premiums tax (exclusive of retaliatory tax) due from plaintiff for 1967 was $120,900.38, computed by subtracting from a gross tax of $162,323.81 a Principal Office Deduction of $41,423.43, which last-mentioned amount is the amount of the Principal Office Deduction resulting from the alternative calculation shown on plaintiff's 1967 premiums tax return supplement as described in paragraph 7 (a) above. The defendant thereupon notified plaintiff further that plaintiff was required to pay the additional amount of $72,900.38 as premiums tax on or before June 15, 1968, or be subject to penalty and interest thereon.

(d) On June 10, 1968, in response to defendant's demand and to avoid the penalties which the Commissioner threatened to impose against plaintiff for non-payment of said additional assessment for the year 1967, plaintiff paid to the Commissioner, under written protest, said additional tax of $72,900.38.

(e) Plaintiff, after receiving written demand therefor from the Commissioner which threatened the imposition of mandatory penalties for any late filing thereof, filed, under protest, with the Commissioner, on or before August 15, 1968, a Retaliatory Tax Information Return with respect to the business done by plaintiff in California dur-

ing the year 1967. This return was reported on the basis of a California Principal Office Deduction of $117,396.19. A copy thereof is attached hereto as "Exhibit N" and by reference is made a part hereof.

(f) Defendant Board, on or about August 27, 1968, assessed and levied against plaintiff retaliatory tax in the amount of $60,270.01, and on or about August 28, 1968, defendant gave written notice to plaintiff that, on the recommendation of the Commissioner, such assessment had been made a retaliatory tax pursuant to section 12284 of the Revenue and Taxation Code of California on plaintiff's business done in California in 1967, and that plaintiff would become subject to penalty in the event such additional tax was not paid by December 1, 1968. The Commissioner and the defendant Board computed such assessment of retaliatory taxes by subtracting plaintiff's California premiums tax liability of $120,900.38 (as computed by Commissioner and defendant in the assessment set forth in paragraph 7 (c) above) and the California fees of $72.50 set forth in paragraph 7 (a) above from $181,242.89, the sum of the Ohio premiums taxes and fees which would have been imposed on a similar California insurer transacting the same kind and amount of insurance business in the State of Ohio that plaintiff transacted in California. Such amount of Ohio premiums taxes and fees was computed by the Commissioner and defendant Board from the figures reported by plaintiff on page 2 of plaintiff's 1967 Retaliatory Tax Information Return ("Exhibit N" included herein by reference in paragraph 7 (e) above) and does not include any real estate taxes which would have been payable to the State of Ohio or any subdivision of the State of Ohio. The parties agree that the figures reported on pages 2 and 3 of "Exhibit N" to the Amended Complaint are factually accurate.

(g) On or about September 20, 1968, plaintiff duly filed with defendant plaintiff's written petition for the correction of said retaliatory tax assessment on 1967 business, seeking the correction thereof to zero and the cancellation thereof. On or about September 20, 1968, an executed duplicate copy of said petition was filed with the Commissioner.

(h) The defendant Board denied plaintiff's petition and so notified plaintiff on November 20, 1968.

(i) On or about November 29, 1968, in response to the demand of the defendant therefor and under the threat of penalty for nonpayment thereof, plaintiff paid to the State Controller the full amount of said additional assessment with respect to 1967 business, $60,270.01, under written protest set forth in plaintiff's letter of transmittal of payment.

(j) On or about December 2, 1968, plaintiff duly filed with the defendant two duly executed written Claims for Credit and Refund of tax with respect to business done in 1967. One of such claims was filed with respect to the portion of the tax paid for the year 1967 which resulted from the denial to plaintiff of part of the Principal Office Deduction it had claimed in its return on the "California Company Basis"; the other claim was filed with respect to the portion of such tax designated as retaliatory tax. Copies of said claims are attached hereto and marked "Exhibits O and P" respectively, and the same are incorporated herein by this reference as if fully written herein.

(k) On or about February 18, 1971, each of said Claims for Credit and Refund was denied in its entirety by defendant Board, and written notice of said denials was mailed to plaintiff on or about February 22, 1971.

(l) On or about February 3, 1972, defendant Board, acting pursuant to section 12424 of the Revenue and Taxation Code, assessed against plaintiff a premiums tax deficiency assessment for year 1967 of $2,180.21 plus interest. Such assessment was made because in making the alternative calculation regarding the Principal Office Deduction in its 1967 premiums tax return supplement as described in paragraph 7 (a) above, plaintiff had not apportioned the real estate taxes paid for parking areas pertaining to its principal office building between the areas used by plaintiff and the areas used by plaintiff's tenants. The amount of the additional assessment was determined solely through the use of figures provided by plaintiff in its 1967 premiums tax return and supplement. As a result of this assessment, the total 1967 premiums tax liability for plaintiff as computed by defendant Board was increased to $123,080.59, and the total 1967 retaliatory tax liability for plaintiff as computed by defendant Board was reduced to $58,089.80. On March 6, 1972, the State Controller received from plaintiff payment of applicable interest charged by defendant; plaintiff denied and continues to deny the validity of any allocation of real estate taxes paid by plaintiff on the parking lots pertaining to its office building housing its principal California office.

(m) Of the $181,170.39 set forth above as taxes paid by plaintiff for the year 1967, defendant Board presently contends that $123,080.59 was due for 1967 premiums tax liability and $58,089.80 was due for 1967 retaliatory tax liability. Plaintiff contends for purposes of this litigation that $44,927.62 was due from it as 1967 premiums tax liability, and that no retaliatory tax for 1967 was due. The $78,152.97 difference between the 1967 premiums tax liability as computed by the Board and as computed by plaintiff is attributable solely to the questions of whether the

1966 amendment to article XIII, section 14 4/5, subdivision (e) is constitutional and whether it can be constitutionally applied to plaintiff.

8. (a) In its California premiums tax return and the supplement thereto for the year 1968 ("Exhibit E" included herein by reference in paragraph 4 above) plaintiff claimed that $179,568.24 was the gross premiums tax (exclusive of any retaliatory tax) payable by plaintiff due to its insurance business in California in the calendar year 1968. The amount of such tax was computed by plaintiff on the "California Company Basis" (as if plaintiff were a California corporation). The return and supplement thereto claimed that the Principal Office Deduction allowable to plaintiff for said year was $124,069.03, leaving a net premiums tax of $55,499.21 claimed by plaintiff on the return as attributable to plaintiff's 1968 business in California, exclusive of any retaliatory tax. In addition to calculation of the Principal Office Deduction on the "California Company Basis", plaintiff's return supplement also contained an alternative calculation of the Principal Office Deduction in which plaintiff attempted to calculate said deduction in the manner prescribed by article XIII, section 14 4/5, subdivision (e) of the California Constitution as amended in 1966 and as applied to an Ohio corporation. By using such alternative calculation, the amout of the Principal Office Deduction was determined by plaintiff to be $43,757.46. Plaintiff, claiming that said 1966 amendment to the California Constitution was unconstitutional, as applied to plaintiff, did not use the alternative calculation in arriving at the amount of premiums taxes it claimed on its return to be due for the year 1968. Plaintiff's return correctly recited that plaintiff had made prepayments on account of said tax in the aggregate sum of $52,000.00, leaving a balance due, as calculated by plaintiff, of $3,-

499.21, which amount was timely paid by plaintiff at the time it filed its said return. In addition plaintiff paid the Commissioner $322.50 as the fees claimed by the Commissioner for the year 1968 for the filing of plaintiff's annual statement, for approval and policy filing, and on account of its certificate of authority.

(b) For purposes of this litigation the parties agree that the factual allegations, figures, and computations shown on plaintiff's 1968 premiums tax return and supplement thereto are true and accurate except that defendant Board contends that the plaintiff's alternative figures for the Principal Office Deduction should have been used to determine the proper amount of the Principal Office Deduction after being adjusted to reflect the allocation of the real estate taxes attributable to the parking areas involved (see paragraph 8 (c) and 8 (l) below).

(c) On or about October 2, 1969, defendant Board, acting under sections 12412 and 12413 of the Revenue and Taxation Code, notified plaintiff that the premiums tax (exclusive of retaliatory tax) due from plaintiff for 1968 was $135,810.78, computed by subtracting from a gross tax of $179,568.24 a Principal Office Deduction of $43,-757.46, which last-mentioned amount is the amount of the Principal Office Deduction resulting from the alternative calculation shown on plaintiff's 1968 premiums tax return supplement as described in paragraph 8 (a) above. The defendant thereupon notified plaintiff further that plaintiff was required to pay the additional amount of $80,-311.57 as premiums tax, with interest at the rate of six per cent (6%) per anum, to wit, $1,606.23, on or before November 1, 1969, or be subject to penalty thereon.

(d) On October 13, 1969, in response to defendant's demand and to avoid the penalties which the Commissioner

threatened to impose against plaintiff for nonpayment of said additional assessment for the year 1968, plaintiff paid to the Commissioner, under written protest, said additional tax of $80,311.57 and $1,606.23 interest, a total of $31,917.80.

(e) Plaintiff, after receiving written demand therefor from the Commissioner which threatened the imposition of mandatory penalties for any late filing thereof, filed, under protest, with the Commissioner, on or before August 20, 1969, a Retaliatory Tax Information Return with respect to the business done by plaintiff in California during the year 1968. This return was reported on the basis of a California Principal Office Deduction of $124,069.03. A copy thereof is attached hereto as "Exhibit Q" and by reference is made a part hereof.

(f) Defendant Board, on or about September 2, 1969, assessed and levied against plaintiff retaliatory tax in the amount of $65,390.47, and on or about September 3, 1969, defendant gave written notice to plaintiff that, on the recommendation of the Commissioner, such assessment had been made as retaliatory tax pursuant to section 12284 of the Revenue and Taxation Code of California on plaintiff's business done in California in 1968, and that plaintiff would become subject to penalty in the event such additional tax was not paid by December 1, 1969. The Commissioner and the defendant Board computed such assessment of retaliatory taxes by subtracting plaintiff's California premiums tax liability of $135,810.78 (as computed by Commissioner and defendant in the assessment set forth in paragraph 8 (c) above) and the California fees of $322.50 set forth in paragraph 8 (a) above from $201,523.75, the sum of the Ohio premiums taxes and fees which would have been imposed on a similar California insurer transacting the same kind and amount of insurance business in

the State of Ohio that plaintiff transacted in California. Such amount of Ohio premiums taxes and fees was computed by the Commissioner and defendant Board from the figures reported by plaintiff on page 2 of plaintiff's 1968 Retaliatory Tax Information Return ("Exhibit Q" included herein by reference in paragraph 8 (e) above) and does not include any real estate taxes which would have been payable to the State of Ohio or any subdivision of the State of Ohio. Defendant Board and the Commissioner did not include in the Ohio burden of $1,065.00 in agents' license fees shown on said page 2 of "Exhibit Q". The parties agree that the figures reported on page 2 and 3 of "Exhibit Q" are factually accurate.

(g) On or about October 9, 1969, plaintiff duly filed with defendant plaintiff's written petition for the correction of said retaliatory tax assessment on 1968 business, seeking the correction thereof to zero and the cancellation thereof. On or about the same date an executed duplicate copy of said petition was filed with the Commissioner.

(h) The defendant Board denied plaintiff's petition and so notified plaintiff on November 6, 1969.

(i) On or about November 21, 1969, in response to the demand of the defendant therefor and under the threat of penalty for nonpayment thereof, plaintiff paid to the State Controller the full amount of said additional assessment with respect to 1968 business, $65,390.47, under written protest set forth in plaintiff's letter of transmittal of payment.

(j) On or about November 21, 1969, plaintiff duly filed with the defendant two duly executed written Claims for Credit and Refund of tax with respect to business done in 1968. One of such claims was filed with respect to the portion of the tax paid for the year 1968 which resulted

from the denial to plaintiff of part of the Principal Office Deduction it had claimed in its return on the "California Company Basis"; the other claim was filed with respect to the portion of such tax designated as retaliatory tax. Copies of said claims are attached hereto and marked "Exhibits R and S" respectively, and the same are incorporated herein by this reference as if fully rewritten herein.

(k) On or about February 18, 1971, each of said Claims for Credit and Refund was denied in its entirety by defendant Board, and written notice of said denials was mailed to plaintiff.

(l) On or about February 3, 1972, defendant Board, acting pursuant to section 12424 of the Revenue and Taxation Code, assessed against plaintiff a premiums tax deficiency assessment for year 1968 of $2,304.72 plus interest. Such assessment was made because in making the alternative calculation regarding the Principal Office Deduction in its 1968 premium tax return supplement as described in paragraph 8(a) above, plaintiff had not apportioned the real estate taxes paid for parking areas pertaining to its principal office building between the areas used by plaintiff and the areas used by plaintiff's tenants. The amount of the additional assessment was determined solely through the use of figures provided by plaintiff in its 1968 premiums tax return and supplement. As a result of this assessment, the total 1968 premiums tax liability for plaintiff as computed by defendant Board was increased to $138,115.50, and the total 1968 retaliatory tax liability for plaintiff as computed by defendant Board was reduced to $63,085.75. On March 6, 1972, defendant received from plaintiff payment of applicable interest charged by defendant; plaintiff denied and continues to deny the validity of any allocation of real estate taxes paid by plaintiff on the parking lots pertaining to its office building housing its principal California office.

(m) Of the $201,201.25 set forth above as taxes paid by plaintiff for the year 1968, defendant Board presently contends that $138,115.50 was due for 1968 premiums tax liability and $63,085.75 was due for 1968 retaliatory tax liability. Plaintiff contends for purposes of this litigation that $55,499.21 was due from it as 1968 premiums tax liability, and that no retaliatory tax for 1968 was due. The $82,616.29 difference between the 1968 premiums tax liability as computed by the Board and as computed by plaintiff is attributable solely to the questions of whether the 1966 amendment to article XIII, section 14 4/5, subdivision (e) is constitutional and whether it can be constitutionally applied to plaintiff.

9. (a) In its California premiums tax return and the supplement thereto for the year 1969 ("Exhibit F" included herein by reference in paragraph 4 above) plaintiff claimed that $188,241.91 was the gross premiums tax (exclusive of any retaliatory tax) payable by plaintiff due to its insurance business in California in the calendar year 1969. The amount of such tax was computed by plaintiff on the "California Company Basis" (as if plaintiff were a California corporation). The return and supplement thereto claimed that the Principal Office Deduction allowable to plaintiff for said year was $128,049.78, leaving a net premiums tax of $60,192.13 claimed by plaintiff on the return as attributable to plaintiff's 1969 business in California, exclusive of any retaliatory tax. In addition to calculation of the Principal Office Deduction on the "California Company Basis", plaintiff's return supplement also contained an alternative calculation of the Principal Office Deduction in which plaintiff attempted to calculate said deduction in the manner prescribed by Article XIII, section 14 4/5, subdivision (e) of the California Constitution as amended in 1966 and as applied to an Ohio corporation.

By using such alternative calculation, the amount of the Principal Office Deduction was determined by plaintiff to be $46,473.23. Plaintiff, claiming that said 1966 amendment to the California Constitution was unconstitutional as applied to plaintiff, did not use the alternative calculation in arriving at the amount of premiums taxes it claimed on its return to be due for the year 1969. Plaintiff's return correctly recited that plaintiff had made prepayments on account of said tax in the aggregate sum of $45,000.00, leaving a balance due, as calculated by plaintiff, of $15,192.13, which amount was timely paid by plaintiff at the time it filed its said return. In addition plaintiff paid the Commissioner $175.00 as the fees claimed by the Commissioner for the year 1969 for the filing of plaintiff's annual statement, for approval and policy filing, and on account of its certificate of authority.

(b) For purposes of this litigation the parties agree that the factual allegations, figures, and computations shown on plaintiff's 1969 premiums tax return and supplement thereto are true and accurate except that defendant Board contends that the plaintiff's alternative figures for the Principal Office Deduction should have been used after being adjusted to reflect the allocation of the real estate taxes attributable to the parking areas involved (see paragraphs 9 (c) and 9 (k) below).

(c) At the time of the filing of its tax return for the year 1969, in addition to prepayments of $45,000.00 and the balance of $15,192.13 set forth by plaintiff as then due, plaintiff paid under protest $81,576.55 representing the additional amount of tax which would have been due if the Principal Office Deduction were computed as shown in the alternative calculation on plaintiff's return supplement. Plaintiff thus paid total premiums tax for 1969 (other than retaliatory tax) of $141,768.68, of which $81,576.55 was

paid under written protest and asserted to be illegally claimed and collected. Said amount of $81,576.55 was paid without awaiting an assessment by the defendant for said amount, in order to simplify the handling of plaintiff's claim for refund of said amount, for the defendant's convenience, and in accordance with plaintiff's letters of transmittal accompanying its tax payments.

(d) Plaintiff, after receiving written demand therefor from the Commissioner which threatened the imposition of mandatory penalties for any late filing thereof, filed, under protest, with the Commissioner, on or before August 7, 1970, a Retaliatory Tax Information Return with respect to the business done by plaintiff in California during the year 1969. This return was reported on the basis of a California Principal Office Deduction of $128,049.78. A copy thereof is attached hereto as "Exhibit T" and by reference is made a part hereof.

(e) Defendant Board, on or about August 18, 1970, assessed and levied against plaintiff retaliatory tax in the amount of $66,265.56, and on or about August 19, 1970, defendant gave written notice to plaintiff that, on the recommendation of the Commissioner, such assessment had been made as retaliatory tax pursuant to section 12284 of the Revenue and Taxation Code of California on plaintiff's business done in California in 1969, and that plaintiff would become subject to penalty in the event such additional tax was not paid by December 1, 1970. The Commissioner and the defendant Board computed such assessment of retaliatory taxes by subtracting plaintiff's California premiums tax liability of $141,768.68 (as computed by Commissioner and defendant using the alternative computation on plaintiff's premiums tax return supplement for 1970) and the California fees of $175.00 set forth in

paragraph 9 (a) above from $208,209.24, the sum of the Ohio premiums taxes and fees which would have been imposed on a similar California insurer transacting the same kind and amount of insurance business in the State of Ohio that plaintiff transacted in California. Such amount of Ohio premiums taxes and fees was computed by the Commissioner and defendant Board from the figures reported by plaintiff on page 2 of plaintiff's 1969 Retaliatory Tax Information Return ("Exhibit T" included herein by reference in paragraph 9 (d) above) and does not include any real estate taxes which would have been payable to the State of Ohio or any subdivision of the State of Ohio. The parties agree that the figures reported on pages 2 and 3 of "Exhibit T" are factually accurate.

(f) On or about September 18, 1970, plaintiff duly filed with defendant plaintiff's written petition for the correction of said retaliatory tax assessment on 1969 business, seeking the correction thereof to zero and the cancellation thereof. On the same date an executed duplicate copy of said petition was filed with the Commissioner.

(g) The defendant Board denied plaintiff's petition and so notified plaintiff on November 6, 1970.

(h) On or about November 30, 1970, in response to the demand of the defendant therefor and under the threat of penalty for nonpayment thereof, plaintiff paid to the State Controller the full amount of said additional assessment with respect to 1969 business, $66,265.56, under written protest set forth in plaintiff's letter of transmittal of payment.

(i) On or about February 22, 1971, plaintiff duly filed with the defendant two duly executed written Claims for Credit and Refund of tax with respect to business done in 1969. One of such claims was filed with respect to the

portion of the tax paid for the year 1969 which resulted from the denial to plaintiff of part of the Principal Office Deduction it had claimed in its return on the "California Company Basis"; the other claim was filed with respect to the portion of such tax designated as retaliatory tax. Copies of said claims are attached hereto and marked "Exhibits U and V" respectively, and the same are incorporated herein by this reference as if fully rewritten herein.

(j) On or about March 24, 1971, each of said Claims for Credit and Refund was denied in its entirety by defendant Board, and written notice of said denials was mailed to plaintiff on or about March 25, 1971.

(k) On or about February 3, 1972, defendant Board, acting pursuant to section 12424 of the Revenue and Taxation Code, assessed against plaintiff a premiums tax deficiency assessment for year 1969 of $2,477.91 plus interest. Such assessment was made because in making the alternative calculation regarding the Principal Office Deduction in its 1969 premiums tax return supplement as described in paragraph 9 (a) above, plaintiff had not apportioned the real estate taxes paid for parking areas pertaining to its principal office building between the areas used by plaintiff and the areas used by plaintiff's tenants. The amout of the additional assessment was determined solely through the use of figures provided by plaintiff in its 1969 premiums tax return and supplement. As a result of this assessment, the total 1969 premiums tax liability for plaintiff as computed by defendant Board was increased to $144,-246.59, and the total 1969 retaliatory tax liability for plaintiff as computed by defendant Board was reduced to $63,-787.65. On March 6, 1972, the State Controller received from plaintiff payment of applicable interest charged by defendant; plaintiff denied and continues to deny the validity of any allocation of real estate taxes paid by plain-

tiff on the parking lots pertaining to its office building housing its principal California office.

(l) Of the $208,034.24 set forth above as taxes paid by plaintiff for the year 1969, defendant Board presently contends that $144,246.59 was due for 1969 premiums tax liability and $63,787.65 was due for 1969 retaliatory tax liability. Plaintiff contends for purposes of this litigation that $60,192.13 was due from it as 1969 premiums tax liability, and that no retaliatory tax for 1969 was due. The $84,054.46 difference between the 1969 premiums tax liability as computed by the Board and as computed by plaintiff is attributable solely to the questions of whether the 1966 amendment to article XIII, section 14 4/5, subdivision (e) is constitutional and whether it can be constitutionally applied to plaintiff.

10. (a) In its California premiums tax return and the supplement thereto for the year 1970 ("Exhibit G" included herein by reference in paragraph 4 above) plaintiff claimed that $201,533.20 was the gross premiums tax (exclusive of any retaliatory tax) payable by plaintiff due to its insurance business in California in the calendar year 1970. The amount of such tax was computed by plaintiff on the "California Company Basis". The return and supplement thereto claimed that the Principal Office Deduction allowable to plaintiff for said year was $121,173.59, leaving a net premiums tax of $80,359.61 claimed by plaintiff on the return as attributable to plaintiff's 1970 business in California, exclusive of any retaliatory tax In addition to the calculation of the Principal Office Deduction on the "California Company Basis", plaintiff's return supplement also contained an alternative calculation of the Principal Office Deduction in which plaintiff attempted to calculate said deduction in the manner prescribed by Article XIII, section 14 4/5, subdivision (e) of the California Constitu-

tion as amended in 1966 and as applied to an Ohio corporation. By using such alternative calculation, the amount of the Principal Office Deduction was determined by plaintiff to be $44,727.04. Plaintiff, claiming that said 1966 amendment to the California Constitution was unconstitutional as applied to plaintiff, did not use the alternative calculation in arriving at the amount of premiums taxes claimed on its return to be due for the year 1970. Plaintiff's return correctly recited that plaintiff had made prepayments on account of said tax in the aggregate sum of $112,706.10. Thus, according to plaintiff's calculation the prepayments for the calendar year 1970 exceeded the amount of the premiums tax due for said year by $32,-346.49. In addition plaintiff paid the Commissioner $125.00 as the fees claimed by the Commissioner for the year 1970 for the filing of plaintiff's annual statement, and on account of its certificate of authority.

(b) For purposes of this litigation the parties agree that the factual allegations, figures, and computations shown on plaintiff's 1970 premiums tax return and supplement thereto are true and accurate except that defendant Board contends that the plaintiff's alternative figures for the Principal Office Deduction should have been used to determine the proper amount of the Principal Office Deduction after being adjusted to reflect the allocation of real estate taxes attributable to the parking areas involved (see paragraphs 10 (c) and 10 (k) below).

(c) At the time of the filing of its tax return for the year 1970, in addition to prepayments of $112,706.10, plaintiff paid under protest $44,100.06 representing the additional amount of tax which would have been due if the Principal Office Deduction were computed as shown in the alternative calculation on plaintiff's return supple-

ment. Plaintiff thus paid total gross premiums tax for 1970 (other than retaliatory tax) of $156,806.16, of which $76,446.55 was paid under written protest and asserted to be illegally claimed and collected. Said amount of $76,-446.55 was paid without awaiting an assessment by the defendant for said amount, in order to simplify the handling of plaintiff's claim for refund of said amount, for the defendant's convenience, and in accordance with plaintiff's letters of transmittal accompanying its tax payments.

(d) Plaintiff, after receiving written demand therefor from the Commissioner which threatened the imposition of mandatory penalties for any late filing thereof, filed, under protest, with the Commissioner, within the time fixed by law, a Retaliatory Tax Information Return with respect to the business done by plaintiff in California during the year 1970. This return was reported on the basis of a California Principal Office Deduction of $121,173.59. A copy thereof is attached hereto as "Exhibit W" and by reference is made a part hereof.

(e) Defendant Board, on or about August 18, 1971, assessed and levied against plaintiff retaliatory tax in the amount of $67,539.12, and on or about August 18, 1971, defendant gave written notice to plaintiff that, on the recommendation of the Commissioner, such assessment had been made as retaliatory tax pursuant to section 12284 of the Revenue and Taxation Code of California on plaintiff's business done in California in 1970, and that plaintiff would become subject to penalty in the event such additional tax was not paid by December 1, 1971. The Commissioner and the defendant Board computed such assessment of retaliatory taxes by subtracting plaintiff's California premiums tax liability of $156,806.16 (as computed by Commissioner and defendant using the alternative

computation on plaintiff's premiums tax return supplement for 1970) and the California fees of $125.00 set forth in paragraph 10 (a) above from $224,570.28, the sum of the Ohio premiums taxes and fees which would have been imposed on a similar California insurer transacting the same kind and amount of insurance business in the State of Ohio that plaintiff transacted in California. Such amount of Ohio premiums taxes and fees was computed by the Commissioner and defendant Board from the figures reported by plaintiff on page 2 of plaintiff's 1970 Retaliatory Tax Information Return ("Exhibit W" included herein by reference in paragraph 10 (d) above) and does not include any real estate taxes which would have been payable to the State of Ohio or any subdivision of the State of Ohio. The parties agree that the figures reported on pages 2 and 3 of "Exhibit W" are factually accurate.

(f) On or about August 25, 1971, plaintiff duly filed with defendant plaintiff's written petition for the correction of said retaliatory tax assessment on 1970 business, seeking the correction thereof to zero and the cancellation thereof. On the same date, an executed duplicate copy of said petition was filed with the Commissioner.

(g) The defendant Board denied plaintiff's petition on October 29, 1971 and so notified plaintiff on November 1, 1971.

(h) On or about November 23, 1971, in response to the demand of the defendant therefor and under the threat of penalty for nonpayment thereof, plaintiff paid to the State Controller the full amount of said additional assessment with respect to 1970 business, $67,639.12, under written protest set forth in plaintiff's letter of transmittal of payment.

(i) On or about March 8, 1972, plaintiff duly filed with

the defendant two duly executed written Claims for Credit and Refund of tax with respect to business done in 1970. One of such claims was filed with respect to the portion of the tax paid for the year 1970 which resulted from the denial to plaintiff of part of the Principal Office Deduction it had claimed in its return on the "California Company Basis"; the other claim was filed with respect to the portion of such tax designated as retaliatory tax. Copies of said claims are attached hereto and marked "Exhibits X and Y" respectively, and the same are incorporated herein by this reference as if fully rewritten herein.

(j) Neither of said Claims for Credit and Refund was acted upon by defendant Board before the filing of the Amended Complaint by plaintiff pursuant to section 13104 of the Revenue and Taxation Code.

(k) On or about February 3, 1972, defendant Board, acting pursuant to section 12424 of the Revenue and Taxation Code, assessed against plaintiff a premiums tax deficiency assessment for year 1970 of $2,711.30 plus interest. Such assessment was made because in making the alternative calculation regarding the Principal Office Deduction in its 1970 premiums tax return supplement as described in paragraph 10 (a) above, plaintiff had not apportioned the real estate taxes paid for parking areas pertaining to its principal office building between the areas used by plaintiff and the areas used by plaintiff's tenants. The amount of the additional assessment was determined solely through the use of figures provided by plaintiff in its 1970 premiums tax return and supplement. As a result of this assessment, the total 1970 premiums tax liability for plaintiff as computed by defendant Board was increased to $159,517.46, and the total 1970 retaliatory tax liability for plaintiff as computed by defendant Board was reduced to $64,927.82. On March 6, 1972, the State Con-

troller received from plaintiff payment of applicable interest charged by defendant; plaintiff denied and continues to deny the validity of any allocation of real estate taxes paid by plaintiff on the parking lots pertaining to its office building housing its principal California office.

(1) Of the $224,445.28 set forth above as taxes paid by plaintiff for the year 1970, defendant Board presently contends that $159,517.46 was due for 1970 premiums tax liability and $64,927.82 was due for 1970 retaliatory tax liability. Plaintiff contends for purposes of this litigation that $80,359.61 was due from it as 1970 premiums tax liability, and that no retaliatory tax for 1970 was due. The $79,157.85 difference between the 1970 premiums tax liability as computed by the Board and as computed by plaintiff is attributable solely to the questions of whether the terms of the 1966 amendment to article XIII, section 14 4/5, subdivision (e) is constitutional and whether it can be constitutionally applied to plaintiff.

11. (a) In its California premiums tax return and the supplement thereto for the year 1971 ("Exhibit H" included herein by reference in paragraph 4 above) plaintiff claimed that $219,187.37 was the gross premiums tax (exclusive of any retaliatory tax) payable by plaintiff due to its insurance business in California in the calendar year 1971. The amount of such tax was computed by plaintiff on the "California Company Basis". The return and supplement thereto claimed that the Principal Office Deduction allowable to plaintiff for said year was $120,354.69, leaving a net premiums tax of $98,832.68 claimed by plaintiff on the return as attributable to plaintiff's 1971 business in California, exclusive of any retaliatory tax. In addition to the calculation of the Principal Office Deduction on the "California Company Basis", plaintiff's return supplement also contained an alternative calculation of the Principal Office

Deduction in which plaintiff attempted to calculate said deduction in the manner prescribed by article XIII, section 14 4/5, subdivision (e) of the California Constitution as amended in 1966 and as applied to an Ohio corporation. By using such alternative calculation, the amount of the Principal Office Deduction was determined by plaintiff to be $42,190.28. Plaintiff, claiming that said 1966 amendment to the California Constitution was unconstitutional as applied to plaintiff, did not use the alternative calculation in arriving at the amount of premiums taxes it claimed to be due for the year 1971. Plaintiff's return correctly recited that plaintiff had made prepayments on account of said tax in the aggregate sum of $124,662.00. Thus, according to plaintiff's calculation the prepayments for the calendar year 1971 exceeded the amount of the premiums tax due for said year by $25,829.32. In addition plaintiff paid the Commissioner $125.00 as the fees claimed by the Commissioner for the year 1971 for the filing of plaintiff's annual statement and on account of its certificate of authority.

(b) For purposes of this litigation the parties agree that the factual allegations, figures, and computations shown on plaintiff's 1971 premiums tax return and supplement thereto are accurate except that defendant Board contends that the plaintiff's alternative figures for the Principal Office Deduction should have been used to determine the proper amount of the Principal Office Deduction (see paragraph 11 (c) below).

(c) At the time of the filing of its tax return for the year 1971, in addition to prepayments of $124,662.00, plaintiff paid under protest $52,335.09 representing the additional amount of tax which would have been due if the Principal Office Deduction were computed as shown in the alternative calculation on plaintiff's return supple-

ment. Plaintiff thus paid total gross premiums tax for 1971 (other than retaliatory tax) of $176,997.09, of which $78,164.41 was paid under written protest and asserted to be illegally claimed and collected. Said amount of $78,-164.41 was paid without awaiting an assessment by the defendant for said amount, in order to simplify the handling of plaintiff's claim for refund of said amount, for the defendant's convenience, and in accordance with plaintiff's letters of transmittal accompanying its tax payments.

(d) Plaintiff, after receiving written demand therefor from the Commissioner which threatened the imposition of mandatory penalties for any late filing thereof, filed, under protest, with the Commissioner, within the time provided by law, a Retaliatory Tax Information Return with respect to the business done by plaintiff in California during the year 1971. This return was reported on the basis of a California Principal Office Deduction of $120,-354.69. A full, true and correct copy thereof is attached hereto as "Exhibit Z" and by reference is made a part hereof.

(e) Defendant Board, on or about August 18, 1972, assessed and levied against plaintiff retaliatory tax in the amount of $65,434.96, and on or about August 18, 1972, defendant gave written notice to plaintiff that, on the recommendation of the Commissioner, such assessment had been made as retaliatory tax pursuant to section 12284 of the Revenue and Taxation Code of California on plaintiff's business done in California in 1971, and that plaintiff would become subject to penalty in the event such additional tax was not paid by December 1, 1972. The Commissioner and defendant Board computed such assessment of retaliatory taxes by subtracting plaintiff's California premiums tax liability of $176,997.09 (as computed by Commissioner and defendant Board using the alternative

computation on plaintiff's premiums tax return supplement for 1971) and the California fees of $125.00 set forth in paragraph 11 (a) above from $242,557.05, the sum of the Ohio premiums taxes and fees which would have been imposed on a similar California insurer transacting the same kind and amount of insurance business in the State of Ohio that plaintiff transacted in California. Such amount of Ohio premiums taxes and fees was computed by the Commissioner and defendant Board from the figures reported by plaintiff on page 2 of plaintiff's 1971 Retaliatory Tax Information Return ("Exhibit Z" to the Amended Complaint, included herein by reference in paragraph 11 (d) above) and does not include any real estate taxes which would have been payable to the State of Ohio or any subdivision of the State of Ohio. The parties agree that the figures reported on pages 2 and 3 of "Exhibit Z" are factually accurate.

(f) On or about August 23, 1972, plaintiff duly filed with defendant plaintiff's written petition for the correction of said retaliatory tax assessment on 1971 business, seeking the correction thereof to zero and the cancellation thereof. On the same date an executed duplicate copy of said petition was filed with the Commissioner.

(g) The defendant Board denied plaintiff's petition and so notified plaintiff on October 26, 1972.

(h) On or about November 27, 1972, in response to the demand of the defendant therefor and under the threat of penalty for nonpayment thereof, plaintiff paid to the State Controller the full amount of said additional assessment with respect to 1971 business, $65,434.96, under written protest set forth in plaintiff's letter of transmittal of payment.

(i) On or about April 30, 1973, plaintiff duly filed

with the defendant two duly executed written Claims for Credit and Refund of tax with respect to business done in 1971. One of such claims was filed with respect to the portion of the tax paid for the year 1971 which resulted from the denial to plaintiff of part of the Principal Office Deduction it had claimed in its return on the "California Company Basis"; the other claim was filed with respect to the portion of such tax designated as retaliatory tax. Copies of said claims are attached hereto and marked "Exhibits AA and BB" respectively, and the same are incorporated herein by this reference as if fully rewritten herein.

(j) Neither of said Claims for Credit and Refund was acted upon by defendant Board before the filing of the Amended Complaint by plaintiff pursuant to section 13104 of the Revenue and Taxation Code.

(k) Of the $242,432.05 set forth above as taxes paid by plaintiff for the year 1971, defendant Board presently contends that $176,997.09 was due for 1971 premiums tax liability and $65,434.96 was due for 1971 retaliatory tax liability. Plaintiff contends for purposes of this litigation that $98,832.68 was due from it as 1971 premiums tax liability, and that no retaliatory tax for 1971 was due. The $78,164.41 difference between the 1971 premiums tax liability as computed by the Board and as computed by plaintiff is attributable solely to the questions of whether the 1966 amendment to article XIII, section 14 4/5, subdivision (e) is constitutional and whether it can be constitutionally applied to plaintiff.

12. No part of the amounts paid under protest has been repaid to plaintiff, and no part thereof has been credited to plaintiff in respect to any other tax due the State of California from plaintiff.

13. There is no dispute between the parties as to the

accuracy of the figures which entered into the computation of the tax amounts at issue in this case as set forth in paragraphs 5 (k), 6 (n), 7 (m), 8 (m), 9 (l), 10 (l) and 11 (k).

14. The parties will make any computations necessary for inclusion in appropriate findings after the court's decision in this matter. In the event the parties are unable to agree on the computation, the case may be reopened by either party to submit any additional evidence which may be required in making such computation.

DATED: December 31, 1976.

PAUL, HASTINGS & JANOFSKY
/s/ By RONALD M. OSTER
Attorneys for Plaintiff

EVELLE J. YOUNGER
Attorney General of California
ERNEST P. GOODMAN
Assistant Attorney General

/s/ TIMOTHY G. LADDISH
Deputy Attorney General
Attorneys for Defendant

EXHIBIT A TO THE STIPULATION OF FACTS

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
SAN FRANCISCO

Certificate of Authority

THIS IS TO CERTIFY, *That, pursuant to the Insurance Code of the State of California,* THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY *of* CINCINNATI, OHIO, *organized under the laws of* OHIO, *subject to its Articles of Incorporation or other fundamental organizational documents, is hereby authorized to transact within this State, subject to all provisions of this Certificate, the following classes of insurance:* LIFE AND DISABILITY *as such classes are now or may hereafter be defined in the Insurance Laws of the State of California.*

THIS CERTIFICATE *is expressly conditioned upon the holder hereof now and hereafter being in full compliance with all, and not in violation of any, of the applicable laws and lawful requirements made under authority of the laws of the State of California as long as such laws or requirements are in effect and applicable, and as such laws and requirements now are, or may hereafter be changed or amended.*

IN WITNESS WHEREOF, *effective as of the* 1st *day of* JULY, 1956, *I have hereunto set my hand and caused my official seal to be affixed this day of* AUG 27, 1956.

/s/ F. BURTON McCONNELL

(SEAL)

AMENDED COMPLAINT FOR RECOVERY OF TAXES PAID UNDER PROTEST

(Filed December 31, 1976)

(CAPTION OMITTED IN PRINTING)

Plaintiff complains of defendant and alleges as follows:

1. Plaintiff incorporates herein all of the facts contained and alleged in the Stipulation of Facts entered into by plaintiff and defendant and filed with the Court on ..... 1976.

2. By reason of the facts contained and alleged in said Stipulation, there is now due, owing and unpaid from defendant to plaintiff the sum of $977,853.57, together with interest as provided by Revenue and Taxation Code Sections 12983 and 13107 at the rate of six percent (6%) per annum as follows: on $128,214.90 from December 1, 1966, to date; on $78,042.57 from July 15, 1967, to date; on $52,517.91 from December 1, 1967 to date; on $3,072.38 from March 15, 1967, to date; on $72,900.38 from June 10, 1968, to date; on $60,270.01 from December 1, 1968, to date; on $81,917.80 from November 1, 1969, to date; on $65,390.47 from December 1, 1969, to date; on $81,576.55 from April 1, 1970, to date; on $66,265.56 from December 1, 1970, to date; on $76,446.55 from March 14, 1971, to date; on $67,639.12 from December 1, 1971 to date; on $78,164.41 from March 15, 1972, to date; and on $65,434.96 from December 1, 1972, to date.

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For the sum of $977,853.57 together with interest thereon as alleged hereinabove;

2. For its costs of suit insurred herein; and

3. For such other and further relief as the court deems just and proper.

DATED: December 20, 1976.

PAUL, HASTINGS & JANOFSKY
RONALD M. OSTER

By /s/ RONALD M. OSTER
Ronald M. Oster
Attorneys for Plaintiff

Of Counsel:

Alan R. Vogeler
Lawrence H. Kyte
Gerald L. Baldwin
Kyte, Conlan, Wulsin & Vogeler
1300 Provident Tower
Cincinnati, Ohio 45202
(513) 421-5828

STIPULATION RE FILING OF AMENDED COMPLAINT AND ANSWER THERETO

(Filed December 31, 1976)

(CAPTION OMITTED IN PRINTING)

IT IS HEREBY STIPULATED by and between the parties hereto, through their undersigned counsel of record, that plaintiff The Western and Southern Life Insurance Company may file herein an Amended Complaint in the form attached hereto as Exhibit "A".

IT IS FURTHER STIPULATED that upon the filing of said Amended Complaint, defendant State Board of Equalization of the State of California shall be deemed to have filed an answer thereto admitting the allegations contained in paragraph 1 of said Amended Complaint and denying each and every allegation contained in paragraph 2 of said Amended Complaint.

DATED: December 31, 1976

PAUL, HASTINGS & JANOFSKY
RONALD M. OSTER

By /s/ RONALD M. OSTER

Ronald M. Oster, Attorneys for Plaintiff The Western and Southern Life Insurance Company

DATED: December 28, 1976

EVELLE J. YOUNGER
Attorney General of California

ERNEST P. GOODMAN
Assistant Attorney General

TIMOTHY G. LADDISH
Deputy Attorney General

By /s/ TIMOTHY G. LADDISH
Timothy G. Laddish, Deputy Attorney General, Attorneys for Defendant State Board of Equalization of the State of California

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SUPPLEMENTAL STIPULATION

(Filed May 24, 1977)

(CAPTION OMITTED IN PRINTING)

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys of record, that Exhibit A attached hereto consists of a true copy of the analyses and the arguments to the voters concerning the 1966 amendment to article XIII, section 14-4/5, and that said Exhibit A is taken from pages 13 and 14 of the election brochure which was sent to each registered California voter prior to the general election of Tuesday, November 8, 1966.

Exhibit A is attached to this stipulation for the limited purpose of showing the contents of said analyses and arguments and not for the truth of the matters therein set forth; provided, however, that either party may offer said Exhibit A for additional purposes subject to objections as to competency, relevancy and materiality but not subject to the best evidence objection or any objection as to its genuineness or the due execution threof.

DATED: May 24, 1977

KYTE, CONLAN, WULSIN & VOGELER
ALAN R. VOGELER

PAUL, HASTINGS, JANOFSKY & WALKER
RONALD M. OSTER

By /s/ RONALD M. OSTER
Attorneys for Plaintiff

DATED: May 17, 1977

EVELLE J. YOUNGER, Attorney General of the State of California

ERNEST P. GOODMAN
Assistant Attorney General

/s/ TIMOTHY G. LADDISH
Deputy Attorney General
Attorneys for Defendant

EXHIBIT A

[COPIED FROM ORIGINAL]

8	TAXATION: INSURANCE COMPANIES; HOME OR PRINCIPAL OFFICE DEDUCTION. Legislative Constitutional Amendment. Establishes formula and limits amount of real property taxes on home or principal office buildings deductible from gross premiums tax by foreign insurers immediately, and by domestic insurers on home or principal office buildings commenced after January 1, 1970. Redefines term "insurer" so that reciprocal or interinsurance exchanges together with their attorneys in fact be considered as single unit.	YES	
		NO	

(For Full Text of Measure, See Page 32, Part II)

General Analysis by the Legislative Counsel

A "Yes" vote on this measure is a vote to limit the amount of the real property taxes on the home or principal office of certain insurance companies which may be deducted from the insurance tax, and to include corporate or other attorneys in fact of reciprocal or interinsurance exchanges within the constitutional definition of insurers which are subject to the insurance tax.

A "No" vote is a vote to retain this deduction in its

present form and to retain the existing definition of "insurer" in the Constitution.

For further details see below.

Detailed Analysis by the Legislative Counsel

Section 14 4/5 of Article XIII of the State Constitution now provides, among other things, that each insurer shall pay an annual insurance tax, which is in lieu of all other state, county, and municipal taxes with specified exceptions, among which is the requirement that insurance companies pay property taxes on their real estate. However, an insurance company, other than an ocean marine insurer, is allowed to deduct from the insurance tax, the amount of property taxes paid on the real property which it owns and occupies as its home or principal office in this state. The property tax on the entire property is deductible, whether or not the insurer actually occupies the entire premises in which its home or principal office is located.

This measure, if adopted by the voters, would amend Section 14 4/5 to limit the amount of the home or principal office deduction by making it subject to a formula under which the deduction would be based on the percentage of the insurer's home or principal office building which the insurer is deemed to occupy, plus one-half of such percentage or 25 percent, whichever is less.

The limitation on the home or principal office deduction would not apply to real property owned by a domestic insurer organized under the laws of this state and licensed to transact insurance business in this state on or before December 31, 1966, when such real property is occupied by the insurer as its home or principal office on January 1, 1970, nor would it apply to such an insurer if

construction of its home or principal office commenced prior to January 1, 1970.

In addition, the measure would amend Section 14 4/5 to expand the definition of "insurer" to include the corporate or other attorneys in fact of reciprocal or interinsurance exchanges and require them to be considered as a single unit.

The measure would further provide that, even though a corporate or other attorney in fact would be treated as a unit with its reciprocal or interinsurance exchange and the unit would pay the insurance tax, each such attorney would be subject to all other taxes imposed upon businesses generally, except for income derived from its principal business as attorney in fact.

Argument in Favor of Proposition No. 8

This tax reform measure will increase state revenues by an estimated million dollars annually without imposing new taxes or increasing existing tax rates.

Insurance companies pay California an annual tax of 2.35% of the total amount of premiums received. This is called the gross premiums tax. The Constitution authorizes companies to deduct from their premium tax bill the amount of real property taxes paid by them on a single office building, which they designate as their "principal office". Over the years, this has offered an effective inducement for companies to build offices in California thereby stimulating the economy in return for some relief from California's exceptionally high gross premiums tax rate. This has worked out to the State's advantage.

A few companies, however, mostly from out-of-state, built

large office buildings and used only a small portion of the space for their insurance business, leasing the balance to tenants in competition with commercial building owners and operators. This caused understandable complaint from the owners of office buildings.

Proposition 8 solves this problem in a workable manner without unduly increasing the tax burden of the already heavily taxed insurance industry. This is done in the following manner:

New limitations are put on the use of the deduction for out-of-state companies and California companies licensed to transact insurance after 1966. For these companies, the new ground rules base the deduction on an occupancy formula. Under these rules a company's deduction of its real property taxes depends on the percentage of the building occupied by it and its insurance affiliates. The deduction is limited to the percentage of such occupancy plus an expansion or growth allowance. Thus, a company can claim the full deduction only if it occupies 75% or more of its building. As occupancy decreases, the deduction decreases.

This formula continues the spirit of the original deduction which has been beneficial to California's economy but modifies it to meet changing conditions and prevent serious abuse.

California's own companies with home offices are permitted to keep the full deduction until they move into a new building, at which time they become subject to the same formula. Therefore, long range, all companies will be on the formula.

This slight advantage given to California's home industry will bring California into line with the 26 other states

which give their home companies some form of tax advantage over out-of-state companies. Some states completely exempt their own companies from premium tax.

A purely technical change made by the measure brings the Constitution into conformity with a 1963 act of the Legislature designed to treat reciprocal insurers and their attorneys-in-fact as a single unit, rather than as separate entities. This unitary approach follows the Federal law and puts all domestic insurers in the same tax position.

This amendment received a unanimous vote in the Senate at the 1966 Session of the Legislature and only two negative votes in the eighty member Assembly. VOTE YES.

CHARLES EDWARD CHAPEL
Assemblyman, 46th District
STEPHEN P. TEALE
Senator, 26th District

Argument Against Proposition No. 8

This proposed constitutional amendment has two major defects and should be soundly rejected by the voters.

The first defect is that it gives a tax break to a small group of insurance companies by extending the provisions of the principal office deduction to attorneys-in-fact. In the next session, the Legislature will be faced with the necessity of making substantial changes in the state tax structure. If we are to start giving tax reductions, we should start by reducing taxes of the property owners of this state, rather than a small group of insurance companies.

The second defect of this measure is that it sets up a grossly discriminatory system of taxation in our state constitution. Out-of-state companies are to have, in effect, a

higher net insurance tax rate than in-state companies with the same type of principal office in California.

We should not use the power of government to give one firm a competitive advantage over any other. The end result of this will be a lessening of competition which will ultimately work to the disadvantage of the consumer. It is also setting a very bad precedent which could lead into a system of favoritism for certain firms through the use of the power of government.

Perhaps the most objectionable aspect to this whole procedure is that it is being sold to the people as a tightening up of an existing loophole. It is granted that this does reduce the principal office deduction for out-of-state insurance firms — but not California firms. This is what causes the objectionable discrimination. However, while closing this loophole it opens another by including the attorneys-in-fact in the definition of insurer. It is very questionable whether there will be any revenue advantage to the state by passage of this measure. At any rate, two defects which are cited above should be compelling reasons to defeat this measure. I am confident that the Legislature can work out a better solution to this problem than the one proposed.

E. RICHARD BARNES, Member
Assembly Committee on Revenue
and Taxation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Honorable A. R. Early, Judge
Thomas Pulce, Deputy Sheriff
M. E. Stipe, Deputy Clerk
Reporter, (None)

C-3189

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, a corporation

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

Counsel for Plaintiff:
Paul, Hastings & Janofsky
Ronald M. Oster

Of Counsel:
Kyte, Conlan, Wulsin & Vogeler
Alan R. Vogeler

Counsel for Defendant:
Evelle J. Younger, Attorney Gen'l of California
by T. Laddish

Nature of Proceedings: Court's Intended Decision

In the above-entitled matter now submitted, judgment is for plaintiff for the full amount of tax refunds sought in accordance with the enclosed Memorandum Decision plus interest.

To dispose of all issues and avoid a possible retrial following appeal the court further finds as follows:

A. Plaintiff is barred from claiming that it should be treated herein as a California insurer because it failed to so claim in its claim for refund. R. & T. Code Section 13103. Cf. *American Chemical Corp.* vs. *County of Los Angeles* (1974) 42 C.A.3d 45 at 55-56, hearing denied, cert. den. 422 U.S. 1007.

B. To the extent that plaintiff's principal office deduction is allowed to plaintiff, its retaliatory tax will be correspondingly increased. The premium tax and the retaliatory tax are mutually interdependent.

C. The 1966 Amendment to California Constitution, Article XIII, Section 14-4/5 (e) and R. & T. Code Sec. 12441 were not intended by the law-makers to be retroactive and can not be applied to 1966 taxes. Cf. *Western & Southern Life Ins. Co.* vs. *State Board of Equalization* (1970) 4 C.A.3d 21, hearing denied, at 34-35.

The stipulation of facts on file herein is adopted as the court's findings of fact. Plaintiff is ordered to prepare appropriate conclusions of law and judgment, submit them to defendant for approval as to form and accuracy and then to the court for signature.

A copy of this minute order and a copy of the Memorandum Decision are mailed to all parties. A Certificate of Mailing is filed. MINUTES ENTERED Aug. 4, 1977

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Original Filed
August 4, 1977
County Clerk

NO. C 3189

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, a corporation,
Plaintiff,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant.

MEMORANDUM OF INTENDED DECISION

This case involves the constitutionality of taxes paid under written protest by plaintiff for the years 1965-71 inclusive pursuant to Insurance Code Section 685 and Article XIII, Section 14-4/5 (f) (3) of the California Constitution as that section was amended November 3, 1964, effective 1965 (now renumbered as Article XIII, Section 28). It also involves the constitutionality of a portion of the premiums taxes paid under written protest by plaintiff for the years 1966 through 1971 inclusive pursuant to Article XIII, Section 14-4/5 (e), as amended in 1966 so as to discriminate in favor of a "domestic insurer" as de-

fined therein and against insurers incorporated outside of California in the credit allowed against the premiums tax known as the home office deduction.

The facts herein are stipulated. They are accurately condensed at pages 1 to 5 of plaintiff's opening brief (see defendants trial brief at page 6, lines 5-7).

The tax imposed by Insurance Code Section 685 is referred to herein by both sides and in the Code as a "retaliatory tax," a confusing term because there are two different types of retaliatory tax. One type has been uniformly upheld by the appellate courts. This is a case of first impression dealing with the second type.

The plaintiff is an insurance carrier incorporated and having its principal office in Ohio. It has a Certificate of Authority for an indefinite term to do business in California issued pursuant to Insurance Code Section 701 which was effective July 1, 1956. Since that date, it has continually done business in this state. Prior to 1965, it constructed an office building on land it owns in this county, established its principal California office therein, and has so occupied it during all years pertinent herein.

RETALIATORY TAX

Let us first examine the issue of the so-called "retaliatory tax." Following the Civil War, the insurance business expanded greatly and there were tremendous abuses. Regulation was needed, but there was no federal legislation to restrain the business. When state regulation was attempted, it was attacked as a violation of the Commerce Clause of the U. S. Constitution. In *Paul* v. *Virginia,* 8 Wall. 168 (U.S. 1868), the United States Supreme Court permitted such state regulation to continue by holding that the insurance business was not commerce at all. *Accord*: *Hooper* v. *California* (1895) 155 U.S. 648, 655, and *New York Life*

Insurance Co. v. *Deer Lodge County* (1913) 231 U.S. 495. A great number and variety of state taxes and regulations then developed, some of which strongly discriminated taxwise in favor of locally incorporated insurers as against those incorporated in other states but also doing business locally. As an antidote to such tax discrimination by other states against local insurers when doing business in those other states, local legislatures often adopted a "retaliatory tax" against out-of-state insurers when doing business locally. Writing under the direction of Prof. Robert E. Keeton in 39 Notre Dame Lawyer 243 (1964), George Pelletier, Jr., states that such statutes had then been adopted in 45 states, noting that they vary considerably in detail.

The purpose of such a retaliatory tax, according to defendant, "is to secure for the insurance companies of the enacting state even-handed treatment by the other states" (DTB 11, lines 11-14). This is a quotation from *Western & Southern Life Insurance Co.* v. *State Board of Equalization* (1970) 4 Cal. App. 3d 21, at 34. In *Atlantic Insurance Co.* v. *State Board of Equalization* (1967) 255 Cal. App. 2d 1 (hear. den.) cert. den. 390 U.S. 529, at page 4, the opinion states that "The common purpose of such legislation in the several states has been to discourage any state from imposing discriminatory taxes or other burdens upon out-of-state companies." And at page 15, the opinion says that "here the purpose of the retaliatory law is to secure reciprocity (citations omitted) . . . . It is designed to achieve uniformity and not to discriminate."

The opinion in *In re Insurance Tax Cases* (1945) 160 Kan. 300, 161 Pac. 2d 726, affirmed (per curiam) in *Prudential Insurance Co. of America* v. *Hobbs* (1946) 328 U.S. 822, expressed the object of a retaliatory tax in similar terms: "It seems to us more justly to be deemed a provi-

sion for reciprocity. It says, in effect, that while we recommend all insurance corporations of other states to the transaction of business within our limits, we insist upon a like recommendation elsewhere, and that if other states shall attempt, directly or indirectly, to debar our corporations from the transaction of insurance business within their borders we shall meet their corporations with the same restrictions and disability. It is, in brief, an appeal for comity; a demand for equality" (161 Pac. 2d 730). Are these objectives served by the type of retaliatory tax before the court herein? We think not. Let us examine that tax.

That there are two different types of retaliatory tax was expressly recognized by the opinion in the *Atlantic Insurance Company* case, *supra,* at page 5. That opinion contrasted the retaliatory tax authorized by Article XIII Section 14-4/5 (f) (3) of the California Constitution as it read *before* it was amended November 3, 1964 with the different type of retaliatory tax authorized by Insurance Code Section 685. The Constitutional provision (now changed) then authorized tax retaliation against insurers from another state only when the tax laws of that state discriminated against California insurers in favor of its domestic insurers, thus giving its domestic insurers a competitive advantage over California insurers within its borders. Unless the context indicates otherwise, as used hereinafter the word "taxes" includes taxes, licenses, fees, and other financial exactions in the aggregate. Section 685 on the other hand imposed a "retaliatory tax upon foreign insurance companies whose home states levied higher taxes upon California companies than California imposed upon companies from those foreign states" (irrespective of whether the foreign state discriminated against California companies or taxed them exactly the same as it did its

domestic companies). The first type of tax is identified in the opinion as a "discriminatory tax," whereas the second is described as a "comparative retaliatory tax" (255 Cal. App. 2d 5). A term more descriptive of the first type, which I will hereinafter use, would be an "anti-discrimination retaliatory tax." It is obvious that the objective described above of discouraging other states from imposing discriminatory taxes on California insurers is effectively served by the anti-discrimination retaliatory tax and is not served at all by the "comparative retaliatory tax." The tax involved herein is of the latter type. A "comparative retaliatory tax" is not really retaliatory at all. It does nothing to prevent discriminatory by other states. It does not insure even-handed treatment by those states of California insurers. If anything, it would seem to stimulate counter discrimination against California carriers.

In 1944 the U. S. Supreme Court overturned its 1868 decision in *Paul* v. *Virginia, supra,* and in *United States* v. *South-Eastern Underwriters Association* (1944) 322 U.S. 533 it was held that insurance was commerce after all, and could be interstate commerce. Congress, however, did not then undertake to exercise its power under the Commerce Clause to regulate the interstate insurance business. Instead, it enacted the McCarran-Ferguson Act (59 Stat. 33; 15 U.S.C. Sections 1011-1015) which returned authority to regulate and tax the insurance industry to the states. As the Act did not purport to repeal any part of the United States Constitution, the authority of the states is, of course, limited by that Constitution's constraints. Just what limits does the federal Constitution place upon the power of the states to tax interstate commerce? One percipient scholar and legal satirist, the late Professor T. Reed Powell, once said that if the American Law Institute were to restate the law of state taxation of interstate commerce, it would read as follows:

State Power to Tax Interstate Commerce

The states may tax interstate commerce.

Comment: The states may not tax interstate commerce too much.

Caveat: How much is too much is beyond the scope of this restatement.

Professor Powell was echoing the laments of members of the Court itself epitomized in the opinion in *Portland Cement Co.* v. *Minnesota* (1959) 358 U.S. 450, at 457-458:

> "Commerce between the States having grown up like Topsey, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. As was said in *Miller Bros. Co.* v. *Maryland,* 347 US 340, 344, 98 L ed 744, 748, 74 S Ct 535 (1954), the decisions have been 'not always clear . . . consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law.' From the quagmire there emerge, however, some firm peaks of decision which remain unquestioned."

In *Prudential Ins. Co.* v. *Benjamin* (1946) 328 U.S. 408, 420, the opinion summarizes the situation as "one of very considerable judicial oscillation." However, even in that era of uncertainty, as stated in *Portland Cement, supra,* there were "some firm peaks of decision which remain unquestioned." Significant herein among those landmarks is the principle that "no State may impose a tax which discriminates against interstate commerce . . . . by providing a direct commercial advantage to local business" (citing cases) (358 U.S. at 458). *Accord: Richfield Oil Corp.* v. *State Board of Equalization* (1946) 329 U.S. 69, at 76, and *Hanover Fire Insurance Co.* v. *Harding* (1926) 272 U.S. 494. This language was quoted approvingly by a unanimous court in *Boston Stock Exchange* v. *State Tax Commission* (1977) 50 L.ed. 2d 514 at 524. The reason behind the rule was simply stated:

> ". . . the very purpose of the Commerce Clause was to create an area of free trade among the several states. . . . The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects."

Cases to this effect are legion. Even Alexander Hamilton wrote, "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but their exportation to foreign markets." THE FEDERALIST No. 11, at 52 (Cooke ed. 1961).

Another recognized landmark is the principle that a

state may tax interstate commerce so that it will carry "its fair share of the costs of state government in return for the benefits" and services it derives from the state. *Richfield Oil Corporation* v. *State Board of Equalization, supra,* 329 U.S. at 75. *Portland Cement Co.* v. *Minnesota, supra,* 358 U.S. at 462. *Complete Auto Transit, Inc.* v. *Brady* (1977) 51 L.ed. 2d 326 at 336.

In other words, "Interstate commerce may be made to pay its way."

The retaliatory taxes herein were levied pursuant to Insurance Code Section 685 and California Constitution Art. XIII, Section 14-4/5 (f) (3) as amended November 3, 1964, upon plaintiff, an insurance carrier incorporated in Ohio. During none of the years pertinent herein did Ohio discriminate against California carriers doing business in Ohio; Ohio imposed the same burdens and taxes on its domestic insurers that it did on California carriers doing business in Ohio. Ohio apparently had a retaliatory tax similar to California's which never became applicable herein because the taxes and burdens Ohio imposed on companies doing business in Ohio were greater than those imposed by California on its domestic insurers.

During this period, the California retaliatory tax was of the type described in the *Atlantic Ins. Co.* case, *supra,* at page 5 as a "comparative retaliatory tax." California imposed its premiums tax upon plaintiff each year and in addition thereto imposed a "retaliatory tax" which represented the difference between the California premiums tax paid by plaintiff and the aggregate taxes that a California company would have had to pay in Ohio upon the same volume of business done therein. The California premiums tax is an "in lieu" tax and, except for real property taxes (which are also paid by foreign carriers), *no other taxes were imposed by California on its own domestic*

carriers. Recognition of this fact is essential to the finding that the California retaliatory tax discriminates against the plaintiff herein. As amended on November 3, 1964, the California Constitution no longer requires that Ohio discriminate against California's insurers doing business in Ohio before California's "retaliatory tax" becomes applicable. This California tax is plainly discriminatory against interstate commerce. No reasonable ground for this discriminatory classification has ever been suggested. The tax has no relationship whatsoever to the benefits or services that the state furnishes a foreign carrier. It is a burden on interstate commerce which directly affects it by making it more costly relative to similar intrastate commerce which does not bear this burden. Tax discrimination is equally onerous whether cast in the form of a license tax, a property tax, a premium tax, an income tax, or a franchise tax. It provides a direct commercial advantage to domestic businesses at the expense of out-of-state businesses.

No California court has every squarely upheld such a discriminatory tax. No federal court has ever upheld a "comparative retaliatory tax" where it was proved that the effect of that tax was discriminatory.

Defendant argues that California has the power to impose a discriminatory tax upon foreign corporations as a condition of their right to continue to do business in California. Let us examine some of these cases upon which defendant relies.

Prudential Ins. Co. v. *Benjamin* (1946) 328 U.S. 408 upheld a premiums tax imposed by South Carolina on out-of-state insurers but not imposed on domestic insurers. Viewed in isolation, this appears to be discriminatory. However, South Carolina denied discrimination (at 411, 412) and the opinion recites that the record did not estab-

lish that the tax was discriminatory in effect when the other taxes paid by domestic carriers but not paid by out-of-state carriers were considered (fn. 36, 3rd paragraph). The Court, however, "assumed" that the tax would be discriminatory in certain other senses (at 428, fn 36 and fn 4). It nevertheless upheld the tax on the ground the Congress had consented thereto in the McCarran-Ferguson Act, simultaneously acknowledging that Congress had no power "to subvert constitutional limitations" (at 430).

The tax upheld was not a so-called "retaliatory tax" of either type. The opinion expressly disclaimed approval of such a tax. In fn 40, it referred to allegedly similar tax statutes of sixteen other states and said that "We express no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein." A retaliatory tax hardly qualifies as "substantially identical."

Shorn of its dicta, the *Benjamin* case upheld a tax which the record therein failed to establish was discriminatory (328 U.S. at 428, fn. 36). It was not even a retaliatory tax. This undermines the conclusion (perhaps an inadvertence) expressed in the opinion in *Franklin Life Ins. Co.* v. *State Board of Equalization* (1965) 63 Cal. 2d 222 in fn. 2. It is also self evident that by the McCarran-Ferguson Act, Congress could not effectively consent to state taxation which violates the due process clause of the United States Constitution. Even the *Franklin Life* opinion acknowledges (63 Cal. 2d at 226) that "Of course, any attempt to assess a retaliatory tax against an insurer from a state which does not discriminate against California insurers, would constitutionally fail." Amen! This statement is echoed at page 5 of the opinion in *Atlantic Ins. Co.* v. *State Board of Equalization* (1967) 255 Cal. App. 2d 1 (hear. den.), cert. den. 390 U.S. 529.

Defendant relies on *In Re Insurance Tax Cases* (1945) 160 Kan. 300, 161 Pac. 2d 726 which was affirmed (per curiam) hortly after the *Benjamin* decision sub. nom. *Prudential Ins. Co.* v. *Hobbs* (1946) 328 U.S. 822. This involved several Kansas taxes including a so-called "retaliatory tax" on out-of-state insurers similar in form, but not in effect, to that herein. The Kansas court rejected the contention that the tax discriminated against out-of-state insurers. To quote it:

> "Plaintiffs contend the tax in question is void because of discrimination between foreign and domestic insurance companies. It is true that demostic insurance companies are taxed on a different basis. They are not required to pay a tax measured by their premiums, but they are required to pay a capital stock tax . . . . and a tax upon the net value of their assets . . . The fact that the tax on domestic companies is upon a different basis than that upon foreign companies does not of itself render the tax invalid . . . . We are unable to find in the record evidence to support the view that the tax in question upon foreign insurance companies is greater than that levied on the home insurance companies." (166 Pac. 2d at 734).

The approach taken by the Kansas court has recently been approved. Referring with approval to earlier opinions cited in fn. 8, in *Complete Auto Transit, Inc.* v. *Brady* (1977) 51 L.ed. 2d 326, the unanimous opinion notes that "these decisions have considered not the formal language of the tax statute, but rather its practical effect . . . ." (at 331). At the same page, the opinion notes that he permissibility of state taxation is "based on the actual effect rather than its legal terminology." Even the *Benjamin* opinion at page 420 states that in resolving these problems

there should be "emphasis on facts rather than dogmatic logistic." Or, as Chief Justice Taft put it at page 510 of the opinion in *Hanover Fire Ins. Co.* v. *Harding* (1926) 272 U.S. 494, ". . . the decision is not dependent upon the form in which the taxing scheme is cast . . . . We must regard the circumstances rather than the form."

Approval by the United States Supreme Court of non-discriminatory taxes in the *Benjamin* and *Hobbs* cases gives little support to defendant's contentions.

We have already mentioned the *Franklin Life Ins. Co.* case, *supra.* That opinion dealt with 1960 retaliatory taxes. At that time, the California Constitution, Art. XIII, Section 14-4/5 (f) permitted such taxes only against "foreign insurers of states discriminating against California insurers" (63 Cal. 2d 222 at 226; also see 233). It does not support such a tax against insurers from states like Ohio which do not discriminate against California insurers. To the contrary, at page 226 the opinion states that ". . . any attempt to assess a retaliatory tax against an insurer from a state which did not discriminate against California insurers would constitutionally fail."

Atlantic Insurance Co. v. *State Board of Equalization* (1967) 255 Cal. App. 2d 1 (hear. den.) cert. den., is also relied upon by defendant. It involved 1959 and 1960 taxes when the law was the same as that governing the *Franklin Life* case and the same result was reached. At page 5 the opinion acknowledges that "the new statute would be unconstitutional if applied to a case where the discrimination . . . is not present." *See* also page 15.

When the express reason for sustaining the constitutionality of California's retaliatory tax has been repealed and its effect is discriminatory, the resulting law is so different that these opinions do not support it. *Western & Southern*

Life Insurance Co. v. *State Board of Equalization* (1970) 4 Cal. App. 3d 21 (hear. den.) involved 1964 retaliatory taxes. Before 1964, the California Constitution had imposed a premiums tax on foreign and domestic insurers alike. When the tax laws of another state discriminated against California insurers in favor of its domestic insurers, California also imposed retaliatory taxes on insurers from that state doing business in California. Effective November 4, 1964, the California Constitution was amended to eliminate the discrimination requirement and thereafter imposed the tax on a foreign insurer when its state of incorporation taxed California insurers more than California would have done – even in the absence of any discrimination by that state. The opinion held that the amendment could not be applied retrospectively and therefore could not be considered in determining 1964 taxes. Dicta in the opinion (at page 30) states that "The California retaliatory tax law does not violate . . . the United States Constitution." The opinion fails to distinguish between the pre-1964 anti-discrimination retaliatory tax and the post-1964 comparative retaliatory tax. It fails to note that the cases cited have upheld taxes only when no discriminatory effect was proved. It also cites the *Atlantic Insurance Co.* case, altogether ignoring the statement therein that "the new statute would be unconstitutional if applied to a case where the discrimination . . . is not present" (255 Cal. App. 2d 1 at 5).

We are persuaded that the more authoriative and convincing dicta is that noted above from *Franklin Life Insurance Co.* v. *State Board of Equalization* (1965) 63 Cal. 2d 222 at 226. We find that the retaliatory tax herein is discriminatory in fact and violates both the due process and commerce clauses of the United States Constitution.

Principal Office Deduction from the Gross Premiums Tax

The second tax involved herein is the gross premiums tax levied pursuant to former California Constitution, Art. XIII Section 14-4/5 (f) (3) which was imposed upon all insurers, out-of-state and domestic, in lieu of all other taxes and licenses except real estate taxes. Plaintiff does not challenge the basic tax. It challenges the denial (pursuant to the 1966 amendment) to it as an out-of-state insurer of the credit against that tax for the payment of local real property taxes, which credit is granted to domestic insurers.

That this principal office deduction was altogether repealed in 1976 is irrelevant herein.

Denial of this credit to plaintiff solely because it is an out-of-state insurer obviously creates a "direct commercial advantage to local business." It is a backhanded way of granting a property tax exemption to domestic insurers while denying it to out-of-state insurers. It invokes the rule that where a taxpayer's federal constitutional rights are concerned, the courts will not be governed by the label that a state attaches to a taxing device (here a privilege tax) but by the practical consequences of the tax measured against constitutional standards.

Obviously such a discriminatory credit for other taxes paid could not stand constitutional testing if applied to an income tax, or to a gross receipts tax. Nor is discriminatory property taxation permitted.

Defendant seeks to sustain this tax credit because the tax upon which it is applied analytically is a franchise tax or a privilege tax. It remains a tax in lieu of income taxes; why should it have different legal consequences?

Defendant argues that this tax credit is valid, that California may discriminatorily tax an out-of-state corporation as a condition for the privilege of doing business in California. The more recent decisions of the United States

Supreme Court do not support this contention. For background material see the illuminating discussion of *Unconstitutional Conditions* in 73 Harvard L.R. 1595 (1960) at 1605-1609.

Quite recently the unanimous opinion of the United States Supreme Court in *Complete Auto Transit, Inc.* v. *Brady* (1977) 51 L.ed. 2d 326 at 337 held that "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscrues the question whether the tax produces a forbidden effect." Ignoring the form in which the principal office deduction is cast and focusing attention on whether it produces a "forbidden effect," we find such an effect – discrimination against interstate commerce because it is interstate commerce.

Thirty years ago in *Freeman* v. *Hewit* (1946) 329 U.S. 249 at 252 the United States Supreme Court said, with reference to the many opinions that are pertinent to this subject, "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future." This court is encouraged by the readiness with which the United States Supreme Court has recently overturned some of the historically unsound and illogical precedents in the field of state taxation. Just this year *Spector Motor Service* v. *O'Connor* (1951) 340 U.S. 602 was specifically and unanimously overruled by *Complete Auto Transit, Inc.* v. *Brady, supra.* Just last year, in *Michelin* v. *Wages* (1976) 423 U.S. 276 the court unanimously overruled *Low* v. *Austin* (1872) 80 U.S. (13 Wall.) 29. Thus encouraged, and with the original purposes of the due process, equal protection and commerce clauses in mind, and following the more recent reasoning and analysis of these matters by our highest court, this court concludes that the denial by defendant to plaintiff of

the principal office deduction is an unconstitutional discrimination, that the California constitutional provision and statute mandating such denial violates the United States Constitution and that, therefore, plaintiff is entitled to that credit for all tax years pertinent herein.

DATED: August 4, 1977.

/s/ A. R. EARLY
JUDGE OF THE
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF
CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE WESTERN AND SOUTHERN LIFE
INSURANCE COMPANY, a corporation,
Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF
THE STATE OF CALIFORNIA,
Defendant.

No. C 3189

CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on June 10, 1977, in Department 15 of the above entitled court, the Honorable Alexander R. Early, Judge presiding, plaintiff The Western and Southern Life Insurance Company appearing by Messrs. Kyte, Conlan, Wulsin & Vogeler

by Alan R. Vogeler, Esq. and by Messrs. Paul, Hastings, Janofsky & Walker by Ronald M. Oster, Esq., and defendant State Board of Equalization of the State of California appearing by Evelle J. Younger, Attorney General of California, by Timothy G. Laddish, Esq., and the parties having agreed to a Stipulation of Facts, and trial briefs having been filed by the parties' respective counsel, and the cause having been argued and submitted for decision, the court, having adopted the parties Stipulation of Facts as its written Findings of Fact, does hereby make in writing its Conclusions of Law, as follows:

1. The carrying on within a state of an insurance business by a corporation incorporated in another state constitutes interstate commerce.

2. The authority to regulate and tax the insurance industry given to the states by the McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33, 15 U.S.C. §§ 1011-15, could not and did not eliminate the restraints on state action in the Constitution of the United States.

3. While a state may tax interstate commerce so that it carries its fair share of the costs of state government in return for the benefits and services it derives from the state, no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business.

4. Prior to November 3, 1964 California authorized tax retaliation against insurers from another state only when the tax laws of that state discriminated against California insurers in favor of its domestic insurers, thus giving the latter a competitive advantage over California insurers within its borders. This type of law can appropriately be called an "anti-discrimination retaliatory tax."

5. The amendment of Article XIII, Section 14-4/5 (f) (3) of the California Constitution on November 3, 1964

purported to authorize and Insurance Code Section 685 imposed tax retaliation against insurers from another state in the years here involved when the laws of that state levied higher taxes upon California insurers doing business in that state than California imposed upon insurance companies from that state doing business in California, irrespective of whether the other state discriminated against California companies or taxed them exactly the same as it did its domestic companies. This type of law appropriately has been called a "comparative retaliatory tax".

6. The objective of California retaliatory taxes is to discourage other states from imposing discriminatory taxes on California insurers. That objective is effectively served by an "antidiscrimination retaliatory tax" and is not served at all by the "comparative retaliatory tax".

7. In none of the years here pertinent did the State of Ohio discriminate against California insurance companies doing business in Ohio, imposing the same burdens and taxes on its domestic insurers that it imposed on California insurance companies doing business in Ohio.

8. Section 685 of the California Insurance Code and Article XIII Section 14-4/5 (f) (3) of the California Constitution impose a comparative retaliatory tax which neither prevents discrimination by other states nor insures even-handed treatment by those states of California insurers.

9. The California retaliatory tax as effective for the years 1965 and following discriminates against insurers from other states, including Ohio, thereby providing a direct commercial advantage to local business and discriminated against interstate commerce, and, therefore, violates both the due process and commerce clauses of the United States Constitution.

10. The denial to a foreign insurer of a credit against the California premiums tax for real property taxes paid

in California on the principal office in California of such foreign insurer under the 1966 amendment to Article XIII Section 14-4/5 (e) of the California Constitution and the 1967 amendment to Revenue and Taxation Code Section 12241 grants a property tax exemption to domestic insurers while denying it to an out-of-state insurer. This change in the law was not intended to be retro-active and is inapplicable to 1966 taxes.

11. The gross premiums tax imposed by Article XIII, Section 14-4/5 of the California Constitution on insurers doing business in the State of California is in lieu of all other taxes except real estate taxes.

12. Article XIII, Section 14-4/5 (e) of the California Constitution, together with Section 12241 of the California Revenue and Taxation Code purported to grant a credit against the gross premiums tax to local insurers for real estate taxes paid to the State of California while denying such a credit to out-of-state insurers.

13. Granting such a credit to local insurers while denying such a credit to out-of-state insurers discriminates against interstate commerce by creating a direct commercial advantage to local business.

14. Just as a discriminatory credit for taxes paid constitutionally would fail as applied to an income tax or a gross receipts tax, so also it is unconstitutional as applied to property taxation.

15. Irrespective of whether the gross premiums tax may be characterized as a franchise or privilege tax, it remains a tax in lieu of income taxes and discrimination in such a tax has the same legal consequences as discrimination in an income tax.

16. Discrimination in granting a credit for real estate taxes against the gross premiums tax is prohibited by the due process and equal protection clauses of the Fourteenth

Amendment to, and by the commerce clause of Article I, Section 8, Clause 3, of the United States Constitution.

17. The gross premiums tax imposed by Article XIII, Section 14-4/5 of the California Constitution and the retaliatory tax imposed by Article XIII, Section 14-4/5 (f) (3) and Section 685 of the California Insurance Code are mutually interdependent, and to the extent that a credit against the gross premiums tax is allowed, the retaliatory tax is correspondingly increased.

18. Sections 12432 and 12290 of the California Revenue and Taxation Code do not bar the collection of additional retaliatory taxes not asscessed by the state within the period set forth therein when an out-of-state insurer successfully contests the assessment of a portion of the gross premiums tax and secures a reduction in such assessment.

19. Plaintiff is barred from claiming that it should be treated as a California insurer because it failed to raise this issue in its claim for refund.

20. Plaintiff is entitled to judgment for the full amount of tax refunds sought, plus interest as provided by statute.

DATED: .....

.....
Judge of the Superior Court

Approved as to form and conformity
with Memorandum of Intended Decision
and Minute Order, filed August 4, 1977.

PAUL, HASTING, JANOFSKY & WALKER
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Attorneys for Plaintiff

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SUPERIOR COURT OF THE STATE OF
CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Filed October 27, 1977

THE WESTERN AND SOUTHERN LIFE
INSURANCE COMPANY, a corporation,
Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF
THE STATE OF CALIFORNIA,
Defendant.

No. C 3189

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff The Western and Southern Life Insurance Com-

pany have judgment against defendant State Board of Equalization of the State of California in the sum of $977,853.57, together with costs, and interest (at the rate of 6 percent per annum through December 31, 1975, and at the rate of 12 percent per annum thereafter) computed pursuant to section 13107 of the Revenue and Taxation Code on the following amounts from the following dates: on $128,214.90 from November 25, 1966; on $78,042.57 from July 14, 1967; on $52,517.91 from November 24, 1967; on $3,072.38 from March 15, 1968; on $72,900.38 from June 10, 1968; on $60,270.01 from November 29, 1968; on $81,917.80 from October 13, 1969; on $65,390.47 from November 21, 1969; on $81,576.55 from March 26, 1970; on $66,265.56 from November 30, 1970; on $76,-446.55 from March 29, 1971; on $67,639.12 from November 23, 1971; on $78,164.41 from March 27, 1972; and on $65,434.96 from November 27, 1972.

DATED: 27 October 1977

/s/ A. R. EARLY
Judge of the Superior Court

Approved as to form and conformity
with Memorandum of Intended Decision
and Minute Order, filed August 4, 1977.

PAUL, HASTINGS, JANOFSKY & WALKER
By: /s/ RONALD M. OSTER
Attorneys for Plaintiff

EVELLE J. YOUNGER
By: /s/ TIMOTHY G. LADDISH
Attorneys for Defendant

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

---

2 Civ. No. 55251
(Super Ct. No. C-3189)

THE WESTERN AND SOUTHERN
LIFE INSURANCE COMPANY,
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA,
Defendant and Appellant.

(Filed November 2, 1979)

APPEAL from a judgment of the Superior Court, Los Angeles County. Alexander R. Early III, Judge. Reversed.

George Deukmejian, Attorney General, Ernest P. Goodman, Assistant Attorney General, and Timothy G. Laddish, Deputy Attorney General, for Defendant and Appellant.

Frost & Jacobs, Alan R. Vogeler, Gerald L. Baldwin, Paul, Hastings, Janofsky & Walker, and Ronald M. Oster for Plaintiff and Respondent.

This case involves the constitutionality of two provisions of California law imposing taxes on foreign insurance companies. The trial court found in favor of the plaintiff insurance company, holding that one of those provisions (the so-called retaliatory tax) was unconstitutional. It also made findings on other issues as set forth in its memorandum of intended decision as follows:

"In the above-entitled matter now submitted, judgment is for plaintiff for the full amount of tax refunds sought in accordance with the enclosed Memorandum Decision plus interest.

"To dispose of all issues and avoid a possible retrial following appeal the court further finds as follows:

"A. Plaintiff is barred from claiming that it should be treated herein as a California insurer because it failed to so claim in its claim for refund. R. & T. Code Section 13103. Cf. *American Chemical Corp.* v. *County of Los Angeles* (1974) 42 C.A.3d 45 at 55-56, hearing denied, cert. den. 422 U.S. 1007.

"B. To the extent that plaintiff's principal office deduction is allowed to plaintiff, its retaliatory tax will be correspondingly increased. The premium tax and the retailatory [sic] tax are mutually interdependent.

"C. The 1966 Amendment to California Constitution, Article XIII, Section 14-4/5 (e) and R. & T. Code Sec. 12441 were not intended by the law-makers to be retroactive and can not be applied to 1966 taxes. Cf *Western & Southern Life Ins. Co.* v. *State Board of Equalization* (1970) 4 C.A.3d 21, hearing denied, at 34-35.

"The stipulation of facts on file herein is adopted as the court's findings of fact. Plaintiff is ordered to prepare appropriate conclusions of law and judgment, submit them to defendant for approval as to form and accuracy and then to the court for signature."

The case was submitted on a stipulation of facts. They may be summarized as follows:

Plaintiff is an Ohio corporation, licensed in 1956 to do business in California. While its principal office is in Ohio it owns a building in Los Angeles which it utilizes as its principal office for California. Approximately 76% of that building is leased by it to tenants not connected with the operations of plaintiff. The taxes imposed by Ohio, on a California corporation doing business in Ohio, exceed the taxes imposed on foreign corporations doing business in California, under the basic premium tax imposed by California. The "retaliatory tax" herein involved imposes on plaintiff (and similar insurers) an additional tax equal to that difference. It is the validity of that additional tax that is the principal issue in this case.

Prior to 1966, California allowed an insurance company to deduct from its premium tax, the amount of local property tax imposed on its principal office in this state; by an amendment in that year, the real property tax deduction was amended so that foreign insurers,[1] but not domestic insurers, were limited to a deduction equal only to the proportion of such taxes attributable to the portion of the home office building used by insurer. The effect, therefore, was to impose on a foreign insurer a larger premium tax than that imposed on domestic insurers.

I

Retaliatory taxes, in some form, exist in at least 49 states. The purpose, as set forth in many cases and in the

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[1] As used herein, and in the literature on the subject, a "foreign" insurance company is one incorporated and having its principal office in a state other than the state imposing the taxes; a "domestic" insurance company is one incorporated in, and having its principal office, in the state imposing the taxes.

literature discussing them, is to put pressure on the several states to impose the same tax burden on all insurance companies, foreign or domestic, and thereby encourage the doing of interstate business.

Prior to 1964, the California Constitution provided for a retailatory [sic] tax involving two elements: a tax on *discriminatory* taxes, i.e., taxation of a California insurer doing business in the home state of a foreign insurer, at a higher rate than that state imposed on its own insurers; and (2) a tax on *comparative* taxes such as the one herein involved. At that time, the statutory law imposed a retailatory [sic] tax only on the comparative theory. In 1964, the California Constitution was amended to delete the provision relating to discriminatory taxes and thereafter both the California Constitution and the statute used parallel language imposing only the comparative tax.

In cases involving the applicability of the pre-1964 tax scheme, the courts held that, because the California Constitution required that a tax imposed by the home state of a foreign insurer involve both the discriminatory and the comparative feature, the statutory attempt to impose a retaliatory tax in situations involving only the comparative tax was invalid as being beyond the California constitutionally granted power of taxation.[2] We agree with plaintiff that the *holding* of those cases was limited to that issue, although there is language, relied on here by defendant, that can be read as sustaining the constitutionality of the present comparative provisions. We turn then, to consider the issue herein involved with no binding California precedent, although the language relied on by defendant is, of course, entitled to our respect.

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[2] *Franklin Life Ins. Co.* v. *State Bd. of Equalization* (1965) 63 Cal. 2d 222; *Atlantic Ins. Co.* v. *State Bd. of Equalization* (1967) 255 Cal. App.2d 1.

For many years, under the compulsion of *Paul* v. *Virginia* (1868) 75 U.S. (8 Wall.) 168, which had held that the business of insurance was not "commerce" within the meaning of the Commerce Clause of the federal Constitution, the states had imposed a variety of retaliatory taxes. In 1944, in *United States* v. *South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, the Supreme Court overruled *Paul* v. *Virginia* and held that the business of insurance was within the commerce clause. Shortly thereafter, Congress enacted the so-called McCarran Act (59 Stats. 33, 15 U.S.C. §§ 1011-1015). That statute provided that "the business of insurance . . . shall be subject to the law of the several States which relate to the regulation or taxation of such business." In *Prudential Ins. Co.* v. *Benjamin* (1946) 328 U.S. 408, the Supreme Court construed that statute and concluded that Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it. . . ." (328 U.S. at 431). We conclude that that decision, and other cases following it,[3] compel us to reject plaintiff's contention that the statutes herein involved are unconstitutional as affecting interstate commerce.

II

However, *Benjamin* also made it clear that the McCarran Act did not insulate state legislation from attack on grounds other than the commerce clause. In that connection, the Supreme Court said (at p. 430):

"Nor is it necessary to conclude that Congress, by en-

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[3] See, for example: *Prudential Ins. Co.* v. *Hobbs* (1946) 328 U.S. 822.

acting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of [state] legislation must have lain some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power. And we agree . . . that there can be no inference that Congress intended to circumvent constitutional limitations on its own power."

Thus we turn to plaintiff's alternative contention, i.e., that the retaliatory taxes violate the due process and equal protection clauses of the Fourteenth Amendment.[4]

We note first that, after the cautionary statement above quoted, the Supreme Court turned to consideration of the contentions that the retaliatory tax there before it did violate some other constitutional restriction. It said (at pp. 437-438):

"These arguments may be summarily disposed of. As for the due process contention, it was settled by a long line of authorities prior to the *South-Eastern* decision, that the . . . provision of the Fourteenth Amendment, as well as that requiring equal protection of the laws, does not forbid the states to lay and collect such a [retaliatory] tax. . . ."

The equal protection contention has been fully considered and rejected by a previous decision in this state in *Atlantic Ins. Co.* v. *State Bd. of Equalization* (1967) 255 Cal.App.2d 1. Although that case involved the pre-1964 changes in the California Constitution, the decision dealt with both of the requirements of the provision as it then stood. After deciding that the Texas laws therein involved

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[4] Although the contention is stated as involving both provisions, the discussions in the briefs are limited to the equal protection contention. We discuss the problem in that light.

did discriminate against California insurers, the court discussed the issue of equal protection as related to the (second) comparative requirement. Relying in part on *Franklin Life Ins. Co.* v. *State Bd. of Equalization* (1965) 63 Cal.2d 222, it was held that the comparative retaliatory tax did not violate the equal protection clause. Whether or not the court in *Atlantic* properly relied on *Franklin,* the decision was a square holding as to the equal protection issue, and not dictum, as we have said above, the pre-1964 California law required that *both* elements of the then constitutional provision be met before a retaliatory tax could be assessed. The Supreme Court denied hearing in *Atlantic.* Right or wrong, we feel impelled to follow it in the case before us. It follows that, like the commerce clause contention, the equal protection contention must also fail.

III

The second major issue raised by this appeal relates to the calculation of the head office tax deduction.[5] That issue has, so far as we can discover, never been litigated in any earlier California case.

The Board argues that the effect of increasing the home office exemption to plaintiff would merely increase, pro tanto, the retaliatory tax payable for that year. Since the amount of the retaliatory tax is the difference between the premium tax paid to California and the comparable tax payable in plaintiff's home state, that contention is correct. It follows that, even if plaintiff is correct in its attack on the constitutionality of the home office exemption, the amount that it paid was correct. Plaintiff's argument here seeks to avoid that result by treating the gross pre-

[5] The entire home office deduction was repealed in 1976.

mium tax and the retaliatory tax as separate and arguing that, if it has overpaid the former and underpaid the latter, it is entitled to a refund on its timely claim for overpaid premium tax and the state is barred by section 12342 of the Revenue and Taxation Code from making a late assessment for underpaid retaliatory tax. This theory misses the reality of the California tax on insurers. The two provisions are but parts of a single taxation scheme. Unless plaintiff has, in the end, paid no more than the scheme required, it is not entitled to any refund.

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

KINGSLEY, J.

We concur:

FILES, P.J.
ALARCON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

---

2 Civ. No. 55251
(Super Ct. No. C-3189)

THE WESTERN AND SOUTHERN
LIFE INSURANCE COMPANY,
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA,
Defendant and Appellant.

ORDER MODIFYING OPINION AND DENYING REHEARING

(Filed November 28, 1979)

THE COURT:*

(1) The opinion heretofore filed in the above entitled case on November 3, 1979, is hereby modified as follows:

(a) In line 10 on page 10 of the Xerox opinion, [line 20, page 32a, herein] delete the word "retaliatory."

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* FILES, P. J.; KINGSLEY, J.

(b) In footnote 3 on page 9 of the Xerox opinion [page 31a, herein] add the following: The tax involved in *Hobbs* has been held to be "substantially identical to Insurance Code section 685." (*Atlantic Ins. Co.* v. *State Board of Equalization* (1967) 255 Cal.App.2d 1, 10.)

(c) In line 13 on page 13 of the Xerox opinion, [line 21, page 34a herein] delete the word "no."

(2) The petition for rehearing is denied.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
San Francisco, California 94102

Dec. 27, 1979

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 55251

Western and Southern Life Ins. Co.

vs.

State Board of Equalization

Respectfully,

G. E. BISHEL
Clerk